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TRANSCRIPT OF RECORD

(Cat. 1 166 • 85796 U.S.C.)

Supreme Court of the United States

OCTOBER TERM, 1937

No. 28

STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDER, RECEIVERS, ETC., PETITIONERS,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR

ON WRIT OF CETIORABI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 13, 1937.

CERTIORARI GRANTED MAY 3, 1937.

SUPREME COURT OF THE UNITED STATES

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[fol. a] [Captions omitted]

[fol. 1]

IN UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF TEXAS

No. 1939. Bankruptcy

In the Matter of TRINITY REFINING COMPANY, a Corporation, Debtor

In Proceedings for Corporate Reorganization

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed June 27, 1936

To the Clerk of the United States District Court for the Northern District of Texas, Fort Worth Division:

You are hereby notified and instructed by the State of Texas and J. C. Clopton and Bullock Hyder, receivers and appellants in the above entitled cause in Proceedings for Corporate Reorganization under Section 77b, to make up a transcript of the record in said cause in said Court for transmission upon appeal to the United States Circuit [fol. 2] Court of Appeals for the Fifth Circuit, from a judgment and decree of the District Court of the United States for the Northern District of Texas, denying and overruling motions filed by petitioners and appellants to vacate an order of the United States District Court wherein motions were filed, requesting the Bankruptcy Court under Section 77b to return certain properties owned by the Trinity Refining Company, a corporation, to the State Court receivers, which property had been summarily taken from the State Court receivers by the Trustee in Bankruptcy under Section 77b, said other motion being on behalf of the State of Texas, through its Attorney General, whereby leave was sought to institute confiscation proceedings in a State Court of Travis County, Texas, against certain oil alleged to be illegal, and held by the Trustee in Bankruptcy as the property of Trinity Refining Company, debtor, and in making up said transcript to include therein the following pleadings, papers and documents, and none

other, set out below, to constitute the record in said cause on appeal:

1. Præcipe for Transcript.
2. Judgment (filed May —, 1936);
3. Order of Court approving Findings of Fact and Conclusions of Law;
4. Petition for appeal with order from that part of order overruling jurisdictional motion filed by the State and State Court receivers (to District Court);
5. Petition for appeal with order allowing same from that part of Court order overruling motion of State to confiscate oil (District Court);
6. Bond on Appeal;

[fol. 3] 7. Assignment of Errors;

8. Notice of appeal and waiver of citation on appeal;
9. Bill of Exceptions;
10. Petition for Appeal (to the United States Circuit Court of Appeals).

These directions and instructions filed on behalf of the State of Texas and J. C. Clopton and Bullock Hyder, petitioners and appellants, for making up transcript of the record, together with waiver of service of a copy of the same on David Donoghue, Trustee in Bankruptcy, for whom said judgment was entered.

William McCraw, Attorney General of Texas; W. J. Holt, Joe Sharp, C. M. Kennedy, William C. Davis, Assistants Attorney General, Attorneys for the State of Texas.

Service of a copy of the foregoing directions to the Clerk for making up transcript of the record on appeal in the foregoing case in Proceedings for Corporate Reorganization under Section 77b, acknowledged this the 25th day of June, 1936, and all other notice and service with reference thereto is hereby waived; the Clerk to proceed forthwith in making up said transcript in accordance with said directions and request.

W. B. Harrell, Attorney for David Donoghue, Trustee in Bankruptcy.

[fol. 4] IN UNITED STATES DISTRICT COURT

ORDER FOR TRUSTEE TO TURN OVER TO STATE RECEIVERS POSSESSION OF 69,900 BARRELS MORE OR LESS OF OIL—Filed June 5, 1936

On the 30th day of March, 1936, came on for hearing the amended motion of the State of Texas, acting by and through William McCraw, its Attorney General, for permission to proceed in confiscation proceeding against 69,900 barrels, more or less, of weathered and/or topped crude oil in an earthen pit in Upshur County, Texas, and the following oil in Gregg County, Texas: About 5,000 barrels, more or less, in steel storage tank No. 5 on the Phillips lease, and about 10,000 barrels, more or less, of fuel oil in tank No. 10 on the Callum lease, and approximately 25,000 barrels, more or less, of oil in tank No. 25 on the Callum lease, and about 37,500 barrels, more or less, of fuel oil in tank No. 37 on the Hanbury lease; and after hearing evidence and argument thereon, the Court finds that Trinity Refining Company, Debtor herein, has no interest in the 69,900 barrels, more or less, of weathered and/or topped crude in the earthen pit in Upshur County, Texas, and that Trinity Refining Company, Debtor herein, does own the oil in steel storage in Gregg County, Texas.

It is, Therefore, Ordered that David Donoghue, Trustee herein, release his possession to J. C. Clopton and Bullock Hyder, Receivers, of 69,900 barrels, more or less, of weathered and/or topped crude of a gravity of approximately 24 gravity and being situated in what is known as the Farris earthen pit in the Augustine Survey in Upshur County, Texas, and being the exact, same and similar oil [fol. 5] described and mentioned in a judgment rendered in Cause No. 9217-C, styled A. C. Wiley vs. East Texas Oil & Refining Company in the Special District Court of Gregg County, Texas, and being the same oil described in the plea of intervention filed by A. C. Wiley in Cause No. 56252, styled The State of Texas vs. V. E. Jackson, et al. in the 126th Judicial District Court of Travis County, Texas, and being the same oil that was described in a judgment rendered in cause No. 56252 styled The State of Texas vs. V. E. Jackson, et al., in the 126th Judicial District Court of Travis County, Texas, on the motion of A. C. Wiley to

vacate the receivership therein as to the oil therein described; and

It is Further Ordered that the said David Donoghue, Trustee, have and exercise no further possession, control or management over said 69,900 barrels, more or less, of oil contained in the earthen pit above described; and

It is Further Ordered that David Donoghue, Trustee, retain possession, control and management of the oil located in Gregg County, Texas, described as approximately 5,000, more or less, barrels of oil in steel storage tank No. 5 on the Phillips lease, Block 77, M. Dillard Survey, and approximately 10,000 barrels, more or less, of fuel oil in tank No. 10 on the Callum lease in the Rhodes Survey, and approximately 25,000 barrels more or less, of oil in tank No. 25 on the Callum lease in the Rhodes Survey, and also about 37,500 barrels, more or less, of fuel oil located in tank No. 37 on the Hanbury lease in the Hokit Survey, subject to the further orders of this Court.

Dated and entered this the 30th day of May, 1936.

James C. Wilson, United States District Judge.

[fol. 6] IN UNITED STATES DISTRICT COURT

PETITION OF THE STATE OF TEXAS TO ALLOW APPEAL AND PETITION FOR SUPERSEDEAS, JOINED BY J. C. CLOPTON AND BULLOCK HYDER, RECEIVERS—Filed June 27, 1936

To the Honorable James C. Wilson, Judge of Said Court:

The State of Texas, acting by and through William McCraw, the duly elected, qualified and acting Attorney General of the State of Texas, and C. C. Clopton and Bullock Hyder, Receivers appointed by the District Court in and for the 126th Judicial District of Travis County, Texas, in cause No. —, styled State of Texas v. V. E. Jackson, et al., and being movants in a certain motion heretofore filed in this cause, seeking the return of certain properties of Trinity Refining Company, debtor, in this proceeding, and which said properties were summarily taken from these Receivers by David Donoghue, Trustee, appointed by this Court pursuant to the petition for corporate reorganization filed in this cause by Trinity Refining Company, considering itself and themselves aggrieved by the judgment

made herein on the — day of —— in the above entitled cause, wherein this Court overruled and denied a motion of the State of Texas and the Receivers above named, whereby it was sought by the State of Texas and said Receivers to have the property held by them pursuant to orders of the State Court in and for the 126th Judicial District of Texas, and which said properties were summarily taken from them by David Donoghue, Trustee, appointed and acting under orders of this Court, in the above entitled cause, and do hereby appeal from such order to the United States Circuit Court of Appeals for the Fifth Circuit, for [fol. 7] the reasons specified in the Assignment of Errors, which is filed herewith, and it and they pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, and that this appeal may operate as a supersedeas of said judgment.

William McCraw, Attorney General of Texas; Joe Sharp, Assistant Attorney General; C. M. Kennedy, Assistant Attorney General; William C. Davis, Assistant Attorney General; W. J. Holt, Assistant Attorney General, Attorneys for the State of Texas, and Receivers.

The foregoing claim of appeal is allowed, and said petition for supersedeas is granted.

Done at the City of Fort Worth, Texas, June 26/36.

James C. Wilson, United States District Judge.

IN UNITED STATES DISTRICT COURT

PETITION OF THE STATE OF TEXAS TO ALLOW APPEAL AND PETITION FOR SUPERSEDEAS—Filed June 27, 1936

To the Honorable James C. Wilson, Judge of said Court:

The State of Texas, acting by and through William McCraw, the duly elected, qualified and acting Attorney Gen- [fol. 8] eral of the State of Texas, considered itself aggrieved by the judgment made herein on the 30 day of May, A. D. 1936, in the above entitled cause, whereby the

motion of the State of Texas, praying for the right and privilege to institute confiscation proceedings in a Court of competent jurisdiction in Travis County, Texas, to confiscate the crude petroleum oil and the crude petroleum oil products set out in said motion, and to make Trinity Refining Company, debtor, and David Donoghue, Trustee in said cause, parties to said proceeding in said Court in Travis County, Texas, does hereby appeal from such order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reasons specified in the Assignment of Errors filed herewith, and prays that this appeal may be allowed, and a transcript of the record, proceedings and papers upon which said judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit, and that this appeal may operate as a supersedeas of said judgment as prayed for in the motion filed in this cause, seeking a supersedeas of said judgment.

William McCraw, Attorney General of Texas. Joe Sharp, Assistant Attorney General. C. M. Kennedy, Assistant Attorney General. William C. Davis, Assistant Attorney General. W. J. Holt, Assistant Attorney General.

The foregoing claim of appeal is allowed, and said petition for supersedeas is granted, and the crude petroleum oil and crude petroleum oil products set out in the motion of the State of Texas is not to be moved during the pendency of the appeal hereinabove allowed.

[fols. 9-10] Done at the City of Fort Worth, State of Texas, June 26/36.

James C. Wilson, United States District Judge.

Supersedeas bond on appeal for $1,000.00, approved and filed June 27, 1936, omitted in printing.

[fol. 11] In United States District Court

Assignment of Errors—Filed June 27, 1936

To the Said Honorable Court:

Come now the State of Texas, William McCraw, Attorney General of Texas, W. J. Holt and William C. Davis,

Assistants Attorney General, and J. C. Clopton and Bullock Hyder, Receivers appointed by the 126th District Court of Travis County, Texas, petitioners and appellants in said cause, and file this, their Assignment of Errors, complaining as follows:

I

That the District Court in making said order (which is sought to be corrected upon appeal) committed an error of law in holding substantially that the motion filed by the State of Texas and J. C. Clopton and Bullock Hyder, Receivers, asking the United States District Court to entertain their motion and enter its order dissolving the injunctions theretofore issued out of said Court against said Receivers from interfering with the possession of the properties of Trinity Refining Company, Debtor by David Donoghue, Trustee, appointed by the United States District Court under Section 77-b of the Bankruptcy Act, and to direct the said David Donoghue, Trustee, to turn over to said Receivers the properties and estates of Trinity Refining Company, Debtor, should be overruled and dismissed. Said Court in entering its order recited that the matters and things presented in the motion filed by the Receivers on the 30th day of March, 1936, were substantially the same as those presented to the Court in said proceeding by the State of Texas and the Receivers on the 14th day of January, 1936, and that the motion so presented [fol. 12] on the 14th day of January, 1936, had been overruled and denied.

The motion of the State and the Receivers filed in the proceeding in corporate reorganization on the 30th day of March, 1936, (the same was duly authorized by order of the State District Court which had appointed them whereas the original jurisdictional motion filed by the State and the Receivers on the 14th day of January, 1936, was not authorized by any order or direction of the State Court) asserted, as did the original motion, that the Bankruptcy Court sitting in proceedings for corporate reorganization under Section 77-b of the Act of Congress amendatory to the Bankruptcy Act of 1898 (Sec. 207, Title 11, U. S. C. A.) had no jurisdiction to enter its summary order directing David Donoghue, Trustee in Bankruptcy under 77-b, to take over all of the properties of the Debtor, Trinity Re-

fining Company, a corporation, from J. C. Clopton and Bullock Hyder, Receivers appointed by the District Court, 126th Judicial District, Travis County, Texas, in certain suits brought by the State of Texas to recover from the Debtor certain taxes, fines and penalties, and for the foreclosure of statutory liens not invalidated by bankruptcy. Such summary order was entered by the United States District Court directing the Trustee in Bankruptcy summarily to take over from the State Court Receivers the property of Trinity Refining Company, a corporation, Debtor, notwithstanding the suits of the State of Texas seeking to recover certain taxes, fines and penalties were filed prior to the filing in the United States District Court of the petition for corporate reorganization under Section 77-b by Trinity Refining Company, Debtor, and notwithstanding the State Court had considered such suits and had taken jurisdiction thereof, seeking the collection of such taxes, fines and penalties and the foreclosure of statutory liens [fol. 13] not invalidated by bankruptcy, and notwithstanding the appointment by the State Court of receivers in aid of foreclosure, with direction and authority to take into their custody all of the property of Trinity Refining Company, and to hold the same in aid of the foreclosure of said liens.

II

That said Court in making said order committed an error of law when it denied the State of Texas, through its duly elected, qualified and acting Attorney General, permission (which permission was sought subject to the pleas to the jurisdiction of the Bankruptcy Court) to bring confiscation suits in the State Courts of competent jurisdiction in Travis County, Texas, and refusing to grant the State authority to make David Donoghue, Trinity Refining Company, Debtor in corporate reorganization proceedings under Section 77-b, pending in the United States District Court, Northern District of Texas, parties defendant in said confiscation suits.

That said order of the District Court is erroneous and said Court in making said order committed errors of law in that said order is wholly unsupported by and contrary to the law.

Reliance for the prosecution of this appeal is placed on the foregoing assignment of errors.

Wherefore, the State of Texas, William McCraw, Attorney General of Texas, W. J. Holt and William C. Davis, Assistants Attorney General, and J. C. Clopton and Bullock Hyder, Receivers appointed by the 126th District Court of Travis County, Texas, petitioners and appellants, [fol. 14] pray that the judgment in said cause for the errors aforesaid be reversed, by the United States Circuit Court of Appeals for the Fifth Circuit, and that they be granted the relief to which they are entitled under this record.

William McCraw, Attorney General of Texas; W. J. Holt, C. M. Kennedy, Joe Sharp, William C. Davis, Assistants Attorney General, Attorneys for the State of Texas.

IN UNITED STATES DISTRICT COURT

Bill of Exceptions—Filed June 27, 1936, at 12 o clock Noon

[Title omitted]

Appearances:

W. J. Holt, C. M. Kennedy, Joe Sharp and William C. Davis, appearing in behalf of the State of Texas;

Ben Greenwood, appearing for J. C. Clopton and Bullock Hyder, State Court Receivers;

W. B. Harrel, appearing for David Donoghue, Trustee in Bankruptcy.

Be it remembered that on the 30th day of March, 1936, the above entitled proceedings came on for hearing and consideration before the Honorable James C. Wilson, United States District Judge, sitting in Proceedings for Corporate Reorganization under Section 77b of the Bankruptcy Act, and said Court, after considering the motions filed by the State of Texas, the nature of which appears more fully in this Bill of Exceptions, having been heard [fol. 15] and considered by the Court and taken under advisement on the — day of May, A. D. 1936, filed in said Court its judgment denying said motions, to which action of the Court the State of Texas and the receivers duly took exception, which said exception was allowed by the Court.

In taking submission of said motions above mentioned, the following matters were considered by the Court:

IN UNITED STATES DISTRICT COURT

PETITION FOR REORGANIZATION

[Title omitted]

To the Honorable Judge of Said Court:

Comes now your petitioner, Trinity Refining Company, hereinafter referred to as Debtor, and respectfully represents:

1

The Debtor is a private corporation, organized and existing under and by virtue of the laws of the State of Texas, and now and during the six months preceding the filing of this petition having its principal office and place of business as fixed by its charter in Fort Worth, Tarrant County, Texas, in the Fort Worth Division of the Northern District of Texas.

2

The capital stock of the Debtor consists of 500 shares of the par value of $100.00 per share or $50,000.00, and 5,000 shares of non-par stock or $25,000.00, totaling $75,000.00. All of said stock is fully paid up. All of the 5,000 shares of non-par stock is issued to J. B. Sowell and 498 shares of the par stock is issued to the said J. B. Sowell; one share of the par stock is issued to T. W. Sowell and one share [fol. 16] is issued to L. A. Rankin; that the said J. B. Sowell, T. W. Sowell and L. A. Rankin are all of the stockholders of the Debtor. That the Debtor's franchise taxes have been fully paid for the year ending May 1, 1936.

3

The principal assets of the Debtor consist of a complete petroleum refinery for the manufacture of gasoline and other products of crude petroleum. That said refinery consists of a complete cracking unit, with two 250-horse power boilers, and one 100-horse power boiler, a pre-heater tube still, a cracking still, fractionating towers, clay towers, pumps, a gasoline recovery plant, a treating plant, about

100,000 barrels of steel storage tankage, and such other apparatus as is necessary and incidental to a modern petroleum refinery together with a two-story office building. Said refinery is located on about five acres of land belonging to the Debtor on the Gladewater-Tyler highway in the town of Gladewater, Gregg County, Texas. The office building is located on adjacent leased ground.

A seven-eighths oil and gas lease covering 40 acres of land in Jones County, Texas.

The Debtor would show that its said refinery is capable of refining and cracking approximately 1,500 barrels of crude oil per day and daily manufacturing therefrom approximately 2500 barrels of gasoline, 400 barrels of kerosene, 670 barrels of distillate and 450 barrels of fuel oil. The said refinery is modern and the material in the same is of the most approved construction; said refinery is practically new, almost all of it having been bought and assembled during the years 1934 and 1935 and at a cost in excess of $250,000.00.

[fol. 17] 4

The present financial condition of the Debtor, as evidenced by a statement of its assets, liabilities and capital stock, as of December 1, 1935, is as follows:

Assets.

Current Assets—		
Tyler State Bank & Trust Co.		$19,206.16
Petty cash		119.35
Deposit—State gasoline bond		1,000.00
Advance payments—Confiscation		8,061.92
Advance deposits		775.00
Everett Banking Co.		7.63
Notes receivable		1,181.25
Accounts receivable		31,289.39
Total		61,634.70
Inventories—		
Refined products—inventory	$15,613.25	
Crude oil, inventory	361.01	
Total		$15,974.26
Total current assets		77,608.96

Fixed Assets—		
Jones County Lease	$10,000.00	
Warehouse stock	3,986.66	
Plant & equipment	92,550.67	
Plant & equipment—#3 unit	44,127.12	
Plant & equipment—#4 unit	82,440.11	
Recovery plant Inv.	8,233.04	
Treating plant Inv.	3,495.89	
Buildings—investment	13,302.78	
[fol. 18] Filling station inv.	51.73	
Office furniture and fixtures	6,575.44	
Real estate	2,250.00	
Total Fixed Assets		$267,013.44
Total Assets		$344,622.40

Liabilities

Current Liabilities—		
Tax Lien Account:		
State of Texas		$69,334.04
United States		50,676.74
Materialman's lien accounts		37,996.14
Contract lien accounts		10,731.79
Common creditors accounts		28,999.61
Accrued pay roll (Nov. 30, 1935)		2,856.64
Total Current Liabilities		$200,594.96
Net Worth—		
Capital stock (par)	$50,000.00	
Capital stock (non-par)	25,000.00	
Total	$75,000.00	
Surplus	$69,027.44	
Total Net Worth		144,027.44
Total Liabilities & Net Worth		$344,622.40

That during the past year and a half and while said Debtor and its refinery were under the control and supervision of its present stockholders, said refinery has been operating at a profit. That during the six months period [fol. 19] ending October 30, 1935, the said refinery has

been operated at an average net monthly earning of $18,293.00. That the exact figures for said six months period are as follows:

Month	Earnings	Deficit
May	$36,954.87	
June	35,072.52	
July	23,748.46	
August	17,312.86	
September	2,514.18	
October*		$5,839.47
Total	$115,602.89	$5,839.47
To balance		109,763.42
	$115,602.89	$115,602.89
Total earnings for period	$109,763.42	115,602.89
Average earnings per month for period	18,293.90	

* NOTE.—Loss shown this month account adjustment of taxes for entire year,

The Debtor has certain raw materials on hand and certain products, as reflected by the above statement. Sufficient raw materials can be obtained for the operation of the refinery, and under present prices and markets, the operation of the properties of the Debtor under experienced business management should net between fifteen and twenty thousand dollars per month.

5

During the last year and a half said refinery has been operated, for the convenience of the Debtor, by V. E. Jack- [fol. 20] son, an employee of the Debtor under the name of "Lone Star Refining Company." Debtor would show that neither V. E. Jackson nor the trade name of Lone Star Refining Company have owned or now own any stock of the Debtor or any of its properties, but that all of the operations of said refinery and all of the profits made by it and all of the properties belonging to said refinery and all contracts and agreements made in the name of "Lone Star Refining Company" or V. E. Jackson, trading as Lone Star

Refining Company, and all the debts and liabilities incurred by said "Lone Star Refining Company" or V. E. Jackson, trading as Lone Star Refining Company, were and are in truth and in fact operations, properties, profits, contracts, debts and liabilities of the debtor.

6

The Debtor is not insolvent but is unable to meet its debts as they mature, and it desires to effect a plan of reorganization, as provided in Section 77-B of the Act of Congress, Amendatory to the Bankruptcy Act of 1898 (Section 207, Title 11, U. S. C. A.)

7

That on the 12th day of October, 1935, the State of Texas brought suit against the Trinity Refining Company, the Debtor and against T. W. Sowell and against J. B. Sowell and against V. E. Jackson, who it alleged did business as Lone Star Refining Company, and against certain others not here necessary to mention, in which suit it sought and seeks to collect penalties against the individual defendants in the sum of $791,000.00 for alleged violations of the statutes of Texas with reference to the production, transportation, handling, sale, etc., of petroleum and its products, and the rules and regulations of the Railroad Commission of Texas promulgated under such statutes, all of such viola- [fol. 21] tions alleged to have been committed by certain named individual defendants in producing oil from three wells (which wells were not owned by the Debtor, and in handling and transporting such oil and in processing and selling said oil and its products and in failing to make certain reports as by said statutes and rules required, and in such suit asked for an injunction to restrain said defendants from further violating such statutes and rules and from disposing of or incumbering any of their assets, and asked for the appointment of a receiver of the properties of the Debtor and of other properties not belonging to the Debtor. Said suit is now pending in the 126th Judicial District Court of Texas in Travis County and is No. 56252 on the docket of said Court and is styled The State of Texas vs. V. E. Jackson, et al. The State Court granted the injunctive relief prayed for, and on the 25th day of October, 1935, it appointed J. C. Clopton and Bullock Hyder receivers of all the properties of the Debtor and of other properties

belonging to other defendants, and on October 30, 1935, said receivers took charge of the Debtor's said properties and have since been and are now in full possession and control of Debtor's properties, as well as the properties of other defendants, and have been and are now operating Debtor's said refinery, as well as the pipe line and oil wells owned by other defendants. The Debtor verily believes and alleges the fact to be that the State of Texas can not be successful in its said suit, and that the statutes, rules and regulations charged to have been violated and the statutes under which said suit is brought are each and all wholly void and unconstitutional, for that they offend against divers provisions of the Constitution of the United States.

8

During the time that the properties of the Debtor were handled and managed by and under the direction of its [fol. 22] present stockholders, they were, as is hereinbefore alleged, operated at a profit. In this connection the Debtor would show that at the time this corporation and its properties were acquired by the present stockholders in the early part of the year 1934, the refinery then owned by the corporation was a very small, incomplete and inefficient plant, but that since said time the Debtor has steadily increased the efficiency of its refinery and improved the same to such an extent that at the time of the filing of this petition, its said refinery is one of the most complete, modern and efficient refining plants in the East Texas Oil Field. From the operations of said refinery during this period, the Debtor has expended on said refinery a sum in excess of $200,000.00 for equipment and improvements. That said refinery is now complete and it will not be necessary to make any further improvements or additions to said refinery, except ordinary repairs, and that said refining plant will be capable of continuing operations, with the ordinary and usual repairs for maintenance, for a period of from three to five years from the time of the filing of this petition. The Debtor would show that its debts, as set out in paragraph 4 of this petition, are now due and past due, and as shown by said paragraph 4, it does not now have funds on hand sufficient to discharge such indebtedness. The Debtor respectfully shows to the Court that the State receivership proceeding hereinbefore mentioned, no plan for the reorganization of the Debtor has been proposed and

none is contemplated, nor has any effort been made in such receivership to discharge the debts and obligations of the Debtor, nor has any method been devised or proposed for such purpose. That the properties of the Debtor are not, under the State receivership, being operated in a business-like manner and at a profit, but are operated at full overhead expense, with the additional expense of receivership, [fol. 23] and at about one-third capacity and at a loss, and that no debts are being paid or can be paid under the present character of operation by the State Receivers. The following is a list of the creditors of the Debtor, together with the amounts due them:

Creditors of Debtor

Nov. 30, 1935—State of Texas, Gasoline tax and asserted lien	$69,334.04
Nov. 30, 1935—United States gasoline tax and asserted lien	37,109.11
Oil, pipe line and other taxes	5,589.15
Gasoline tax due by State Receivers operating plant	7,942.98
Oil, pipe line and other taxes	35.10
Total to United States	$50,676.74
Materialman's Lien Creditors:	
Arkansas Pipe & Supply Co.	1,444.42
T. H. Anderson	963.29
Atlas Supply Co.	9,460.88
J. B. Beard Corp	1,684.05
Briggs-Weaver Machinery Co.	876.19
Dallas Belting Co.	658.19
Dodd Pipe & Supply Co.	1,514.11
Gladewater Pipe & Supply Co.	704.66
Hall Lumber Co.	4,382.14
Industrial Scientific Supply Co.	1,296.28
Linde Air Products Co.	1,565.00
Louisiana Iron & Supply Co.	261.94
Mosher Steel Co.	5,458.18
Oil Well Supply Co.	1,777.81
Refinery Casting Corp.	423.20
John Tancred	5,525.89
Total	$37,996.14

[fol. 24] Contract Lien Creditors:

Clark Bros.	2,012.50
R. E. Bryan, Inc.	613.06
Underwood-Elliott-Fisher Co.	830.00
Eagle-Pitcher Sales Co.	200.00
Fredonia Securities Co.	76.23
General American Tank Car Corp.	7,000.00
Total	$10,731.79

Common Creditors (Unsecured):

Ables Supply Co.	115.55
Alice Manufacturing Co.	37.67
George Auten	17.66
Walter Bennett Motor Co.	2.00
M. L. Bath & Co.	31.60
R. E. Bryan, Inc.	58.80
T. B. Butler Pub. Co.	125.00
Ballard Drug Co.	20.20
Ralph Brodey Co.	124.31
The Brown Instrument Co.	276.57
Burdett Oxygen Co.	154.36
Calmec Manufacturing Co.	172.01
D. W. Canfield Ins. Agency	751.12
The Coen Co.	200.00
The Coerver Co.	285.00
Commerce Clearing House	100.00
The Crain Co.	79.75
Frank Chandler	13.53
The Chicago Journal of Commerce	7.50
Cooper-Bessemer Co.	56.00
Cooper-Keller Oil Co.	6.26
Cash	700.00
Cash	797.52
Cash	261.46
Mabel Clark	50.00
T. L. Cline	36.50
Bradley & Blake	6,000.00
[fol. 25] The Durion Co.	27.25
Duro-Test Corp.	44.20
Day & Night Garage	.80

Duec Metallic Corp.	5.00
G. E. Dixon	58.50
Elliott & Waldron Abst. Co.	55.00
East Texas Oil Co.	18.22
Fisher Governor Co.	239.14
Gladewater Ind. School Dist. Tax	91.97
Harry Goldmand	5.90
Green Bros.	685.05
Gregg County Tax Collector	157.50
Gladewater Daily News	16.00
Gladewater Water & Sewage Co.	191.98
Gladewater Pipe & Supply Co.	78.75
Harberson-Walker Refractories	3.68
Henderson Glass Co.	73.50
Holley Motor Co.	41.40
Home Furniture Co.	29.15
Helms Printing Co.	10.00
Hodges Motor Co.	3.36
Harrell & Allen	10.00
H. H. Howell	540.35
J. H. Harper	145.52
Herley Gasoline Co.	9.24
O. L. Hay	61.00
John E. Haynes	75.00
Ideal Electric Co.	69.84
Interstate Electric Co.	271.45
International Derrick & Equipment Co.	200.00
P. F. Jennings	71.15
V. E. Jackson	250.01
Kennon's Tin Shop	250.01
Kansas City Testing Laboratories	7.50
Kilgore Ice Co.	42.00
Kenebrew Ice Co.	21.00
Liberty Mfg. Co.	162.94
Lincoln Tank Co.	7.55
P. F. Magee Co.	244.76
[fol. 26] Malakoff Brick Co.	113.00
Mid-West Pipe & Supply Co.	23.00
Monroe Calculating Machine Co.	55.65
McWilliams Hdw. & Furn. Co.	2.00
McKesson-Crowdus Co.	21.00
Mathiwson Alkali Works	383.25
J. P. McGee	62.50

D. L. Hertsbacher	75.00
Motor Finance Co.	54.05
A. J. McDonald-Bailey Sheppard	1,624.50
R. J. McMurry	2,500.00
Nan O'Rourke	50.00
A. B. Furington	41.20
Postal Telegraph & Cable Co.	12.79
Plains Oil & Gas Co.	119.37
B. S. Pruitt	100.00
Pearlstone Ash Grocery Co.	4.75
P. S. Riddle Hardware Co.	5.52
Rose Pipe & Supply Co.	8.68
Ross Mehan Founderies	26.41
Royal Typewriter Co.	90.00
Roy Roberts	54.55
L. A. Rankin	159.50
R. E. Rowland	75.00
Republic Underwriters	146.51
Shreveport Pipe & Supply Co.	3.75
H. P. Smead	201.00
Smith Separator Co.	7.39
Southwestern Gas & Electric Co.	819.01
Spencer-Harris Machine Shop	358.88
Standard Sanitary Mfg. Co.	18.17
Steve's Pipe & Supply Co.	2.75
H. K. Stahl Co.	4.38
Suburban Fuel Oil Co.	10.97
Suspense	1,138.31
Star Clothing House	123.56
Spartan Schools	561.00
Southwestern Bell Telephone Co.	347.42
[fol. 27] Pete Skouby	121.75
Twenty Printing Company	1,839.50
Texas Oil Products	559.97
Texas State House Reporter	60.00
Texas Pacific Railway Co.	12.63
Todd Sales Co.	286.73
Texan Oil Co.	12.00
Trans-American Petroleum Co.	23.07
Texas Railroad Commission	74.80
Traders in General Insurance Co.	497.93
Wallace Tobin	15.00
Taxes—State and County	47.25

Union Steam Pump Co.	101.57
United States Fidelity Co.	10.00
United States Rubber Products Co.	50.04
Underwood-Sundstrand Agency	18.00
Universal Match Co.	27.25
D. B. Vannest	174.40
Wooley Welding Co.	14.81
Wayne Co.	11.25
Ward Studio	7.50
West Disinfectant Co.	8,45
Wooley Tool Service Co.	32.98
Woodward-Wight Co.	114.81
Western Union Tel. Co.	257.84
McCord Radiator Co.	4.06
M. Toler	125.00
Briggs-Weaver Big Weave Machine Co.	26.80
Texan Motor Oil Co.	39.60
Louise Toler	37.50
White Super-Service Station	381.57
W. F. Whitgen	87.50
Total	$28,991.61

There are 118 common creditors listed above of $300.00 each or less, a total of $8,513.93.

[fol. 28] 9

The properties of the Debtor, if operated in a business-like manner, can in a reasonable length of time pay the present past due debts, and thereafter pay the debts of the Debtor as they mature. The Debtor alleges that it is to the best interest of the creditors of the Debtor, as well as to the Debtor itself and its stockholders, that a plan of reorganization be formulated and a method for the payment of the debts devised. The Debtor has drawn a plan of reorganization, which it files at the same time it files this petition, under which plan, if confirmed by the Court, the Debtor believes that it can protect and safeguard its creditors and their rights and discharge all of the indebtedness owed by it. The Debtor alleges that unless some plan for reorganization and some method for the payment of its debts be devised, that certain of its secured creditors will institute foreclosure proceedings upon its properties and

that insolvency and bankruptcy will ensue, to the irreparable injury of the Debtor and of its creditors generally. The Debtor alleges that such reorganization and method for the discharge of its debts can be more promptly and satisfactorily devised and more efficiently carried out in this Honorable Court and under the provisions of Section 77-B of the Bankruptcy Act of 1898 as amended, than could be done in any other kind or character of proceeding, including any receivership. The Debtor alleges that trustees should be appointed by this Honorable Court to take over, manage and operate its said properties with such other powers and duties as the Court might see fit to give and impose upon them, in order that said reorganization may be efficiently completed and the debts of the Debtor be discharged and extinguished.

[fol. 29] Wherefore, the Debtor prays that:

1. This petition be approved as properly filed under Section 77-B of the Bankruptcy Act of 1898 as amended.

2. That a trustee or trustees be immediately appointed by this Court to take possession of all of its properties and to demand and take same from the possession of J. C. Clopton and Bullock Hyder, receivers appointed by the District Court of Travis County, Texas, 126th Judicial District, in Cause No. 56252, styled The State of Texas vs. V. E. Jackson, et al., and that said trustee or trustees be authorized and directed to operate the Debtor and its properties as a going concern and to carry on its business; to carry out and perform its existing contracts; to enter into new contracts in the ordinary course of business for the benefit of the Debtor and its creditors; to pay all obligations incurred in the future in the ordinary course of business; to borrow such funds as the Court may find necessary; to carry out under the directions of the Court the plan of reorganization approved and confirmed by the Court; and to pay all the debts and claims against the Debtor approved by the Court under the plan of reorganization; and to do any and all other things necessary and proper to be done for the efficient operation of the Debtor and its properties and for the completion of the plan of reorganization confirmed by the Court, as the Court shall find meet and proper; and that such trustee or trustees be required to make reports in and to this Court at such times

and in such manner as the Court shall find proper; and that such other and further orders, writs and decrees issue as the Court shall find necessary and proper.

3. That a hearing be held within thirty days, as provided by law, to determine whether or not the trustee or trustees appointed by this Court shall be continued as [fol. 30] permanent trustees; and for such other hearings and notices as shall be lawful and proper; and that all of said proceedings herein prayed for and such further proceedings as may be had herein be had in accordance with the provisions of Section 77-B of the Bankruptcy Act of 1898 as amended.

Trinity Refining Company, (Signed) by T. W. Sowell.

Attest: (Signed) L. A. Rankin, Secretary. (Signed) T. W. Sowell, J. B. Sowell, L. A. Rankin, The Stockholders of the Trinity Refining Company. ——, Attorney for Trinity Refining Company.

Duly sworn to by T. W. Sowell. Jurat omitted in printing.

[fol. 31] EXHIBIT TO PETITION

THE STATE OF TEXAS,
County of Dallas:

I, L. A. Rankin, on oath state that I am Secretary of Trinity Refining Company, a corporation, and that the Board of Directors of said corporation did in Dallas, Texas, on the 16th day of December, 1935, at a special called meeting for said purpose, pass the following resolution:

"Resolved that Trinity Refining Company, a corporation, as Debtor, file a petition in the District Court of the United States for the Northern District of Texas and the Fort Worth Division, for a reorganization of said corporation in accordance with the provisions of Section 77-b of the Bankruptcy Act of 1898 as amended; and

Simultaneously with the filing of said petition, it file, submit and propose a plan of reorganization as provided in said Section, as follows:

(The foregoing plan is here copied in the minutes of the corporation.)

Resolved that said action be the unanimous vote and act of the Board of Directors.

J. B. Sowell, T. W. Sowell, L. A. Rankin."

(Signed) L. A. Rankin.

Subscribed and sworn to before me, this the 17th day of December, 1935. (Signed) Helen Vaughan, Notary Public, Dallas County, Texas. (Seal.)

[fol. 32] IN UNITED STATES DISTRICT COURT

[Title omitted]

PLAN OF REORGANIZATION

To the Honorable Judge of said Court:

Comes now the Debtor in conformity with and under the terms and provisions of Section 77-B of the Bankruptcy Act of 1898 as amended and at the time of the filing of the petition for reorganization, files, submits and proposes the following as a plan of reorganization:

1

All the fixed properties of the Debtor shall be retained by the Debtor, subject to the interests, claims or liens of the creditors and the provisions of this plan, and shall be operated as a going concern under the orders of the Court.

2

The creditors of the Debtor are divided into the following classes:

(a) Tax lien creditors:

(1) State of Texas $69,334.04.

(2) United States $50,676.74.

[fol. 33] (b) Materialman's lien creditors; listed in petition $37,996.14.

(c) Contract lien creditors; listed in petition $10,731.79.

(d) Common creditors (unsecured); listed in petition $28,999.61.

The Debtor makes no attempt to classify the lien creditors as to which liens are superior and junior, but such classification should be made by the Court.

3

The capital stock of the corporation consists of 5,000 shares non-par, minimum $25,000.00, fully paid and owned by J. B. Sowell, and 500 shares of the par value of $100.00 per share or $50,000.00, fully paid, 498 shares owned by J. B. Sowell, one share owned by T. W. Sowell and one share owned by L. A. Rankin. The said stockholders of the Debtor shall deposit for the benefit of the secured creditors the entire capital stock of the corporation, subject to the further provisions of this plan, in the treasury of the Debtor or in the registry of this Court, as the Court may direct, which stock shall be held as additional and collateral security for the benefit of the otherwise secured creditors.

4

Upon confirmation of this plan, there shall be issued by the Debtor to each such creditor a certificate of indebtedness, to be in the amount of the debt of the creditor at the date of the issuance of said certificate, which certificate shall bear interest at the rate of eight per cent per annum from its date. Such certificate shall be payable in sixteen [fol. 34] equal monthly installments, together with interest as it accrues. The first installment shall be due and payable on or before forty-five days after the date of such certificate; the next to be due and payable thirty days after said forty-fifth days; and the remaining installments to be due and payable one every thirty days thereafter until the full amount of principal and interest has been paid.

5

Upon default in the payment of three consecutive installments on the certificate of indebtedness, as provided in paragraph 4 above, each creditor holding such defaulted certificate of indebtedness shall be entitled to make known to the Court the fact of such defaults, together with notice to the Debtor, and the Court, after ten days notice to the Debtor, upon being satisfied that the plan of the Debtor as herein submitted is unworkable and that a satisfactory, workable plan can not be devised, may direct that there be

delivered to such creditor such portion of the stock as the unpaid portion of his debt bears to the total unpaid indebtedness of the secured creditors.

6

The certificate of indebtedness shall be subject to call of the Debtor and retirement at any time by the payment to the creditor of the amount then due him and remaining unpaid upon the certificate of indebtedness. Upon such payment to the creditor, the certificate of indebtedness shall ipso facto become null and void and the debt of the creditor fully discharged, and the Court shall direct that there be returned to the stockholders that proportion of the stock that is equal to the proportion that the certificate of indebtedness paid bears to the total of the certificates of indebtedness issued.

[fol. 35]

7

The certificates of indebtedness shall be transferrable only upon the books of the Debtor, and the Debtor can discharge the certificates of indebtedness and the debt of a creditor and retire a proportionate amount of stock in the treasury of the Debtor or registry of the Court upon payment to the person or corporation shown on the books of the corporation to be the holder of the debt and certificate of indebtedness. The owner of the debt evidenced by the books of the corporation shall be held to be the owner of the certificate of indebtedness.

8

Neither the placing of said stock in the treasury of the Debtor or the registry of the Court for the benefit of the creditors, nor the certificates of indebtedness, nor this plan, nor the acceptance by the creditors of any of the benefits of this plan, nor any other thing done under this plan shall in any wise or manner impair or diminish any right, lien, claim or security of any kind or character which such creditor now has or may be entitled to, and all the rights, liens, claims and securities of such creditor shall be and are hereby brought forward and continued in full force and effect as they existed at the time of the filing of the petition for reorganization, save and except the extension of the time for payment of the debt of such creditor in accordance with this plan.

9

The provisions of paragraph 5 hereof shall be cummulative of any and all rights and remedies which the secured creditors had or may be entitled to by virtue of their respective debts, rights, liens, claims and securities, and of the provisions of the Act of Congress under which the petition is filed.

[fol. 36]

10

Each class of creditors, whether two-thirds thereof or not shall accept this plan, are adequately protected by this plan for the realization by them of the value of their interests, claims or liens by the retention of the properties of the Debtor, subject to such interests, claims or liens, as provided in paragraph 1 of this plan.

11

There are 118 creditors whose claims are each $300.00 or less, aggregating $8,513.92, which claims, upon the acceptance of this plan, may, under the direction of the Court, be paid in cash in full.

12

The properties of the Debtor shall be operated as a going concern under the orders of the Court: under this plan

(a) There shall be first paid in cash as they accrue the administrative expenses of the plan and the operation and maintenance expenses of the plant of the debtor.

(b) Under the present prices and markets, the operation of the plant of the Debtor under experienced business management should net between fifteen and twenty thousand dollars per month. There shall be monthly set aside such amount as is required to discharge as they mature the monthly installments to the secured creditors under this plan.

(c) Of the amount then remaining from the operation of the plant, 75 per cent shall be monthly paid to the common creditors (unsecured) to discharge their indebtedness, and [fol. 37] 25 per cent shall be monthly paid to the present stockholders of the Debtor.

(d) After the indebtedness due the common creditors (unsecured) have been fully paid under this plan, then the

money remaining on hand from the operations of the plant of the Debtor, after the payment of the debts and claims specified in subdivisions (a) and (b) of this paragraph, shall as it monthly accrues be applied as follows: (1) 50 per cent shall remain in the treasury of the Debtor for any emergency or contingency that may then exist or that may arise and subject to the orders of the Court; and (2) 50 per cent shall be paid to the present stockholders of the Debtor.

Wherefore, Debtor, in conformity with a resolution of its board of directors adopted at a meeting held in Dallas, Texas, on the * * * day of December, 1935, submits the above and foregoing as a plan of reorganization within the provisions of Section 77-B of the Bankruptcy Act of 1898 as amended, and asks that such notice be given as within the judgment of the Court is necessary and proper for a hearing upon this plan and any objections that may be made thereto and that upon such hearing, the Court confirm the plan; and for such orders and decrees of the Court as may be necessary and proper for the carrying out and execution of said plan for reorganization.

Trinity Refining Company, a corporation, by T. W. Sowell, President.

Attest: L. A. Rankin, Secretary.

——— ———, ——— ———, Attorneys for the Debtor.

[fol. 38] The State of Texas,
County of Dallas:

Before me, the undersigned authority, on this day personally appeared J. B. Sowell, T. W. Sowell and L. A. Rankin, who being duly sworn, on oath state that they are all of the stockholders of Trinity Refining Company, a corporation. That all of the stock of said corporation has been paid for and issued. That J. B. Sowell owns all of the 5,000 shares, non par, $25,000.00 minimum, and owns 498 shares of the par stock; that T. W. Sowell owns one share of the par stock, and L. A. Rankin owns one share of the par stock of said corporation. That there is no other issued outstanding stock. That they have read and are familiar with the petition of Trinity Refining Company, called Debtor, for a reorganization under the provisions of Section 77-B of the Bankruptcy Act of 1898 as amended, and that the matters and things therein alleged as facts are true, and that they, each

for himself and as a stockholder of the Debtor, accept the plan of reorganization to which this affidavit is attached and agree to be bound thereby and be bound by the orders of the Court confirming the same and directing its execution, and here and now, in compliance with the plan, tender with the plan to the Court all of the certificates of stock of said Debtor, to be dealt with as the Court *any* direct in accordance with said plan.

That said Debtor has the following executory contracts:

(1) A contract with the Texas & Pacific Railway Company for the construction and use of a spar track from the main line of the Texas & Pacific Railway to, near and adjacent the plant of the Debtor in Gladewater, Gregg County, Texas.

(2) A contract with General American Tank Car Company, of Chicago, Illinois, for the rental and use of tank [fol. 39] cars for the shipping of petroleum oil and its products.

(3) A contract of lease of about one-half acre of land adjoining the land on which the refining plant of Debtor is located, which one-half acre of land was leased for the erection of the office building of the Debtor.

That no claims and shares of stock have been purchased or transferred by either of the affiants after the commencement or in contemplation of the proceedings for the reorganization of the Debtor.

That no unexpired leases have been rejected and surrendered by Debtor.

T. W. Sowell. J. B. Sowell. L. O. Rankin.

Subscribed and sworn to by J. B. Sowell, T. W. Sowell and L. A. Rankin before me, this the 17th day of December, 1935. Helen Vaughan, Notary Public, Dallas County, Texas.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER APPOINTING TRUSTEE, ETC.

On this the 18th day of December, 1935, there was presented to the Judge of this Court the petition of the Trinity [fol. 40] Refining Company, a corporation, petitioning for corporate reorganization under Section 77-B of the Bankruptcy Act of 1898 as amended, and the said Judge having duly considered said petition and being satisfied that such petition complies with the provisions of said law and has been filed in good faith, said petition is accordingly approved as properly filed in compliance with said law, and as filed in good faith.

And it is further ordered by the Judge of this Court that David Donaghue, of Fort Worth, Texas, be appointed trustee of all of the properties of said debtor and of the debtor's estate, subject to the further orders of the Court; that said trustee duly execute a bond as trustee in the sum of $10,000.00, payable to the United States, conditioned in terms of law for the faithful performance of his duties as trustee, and upon the execution and approval of said bond, that the said trustee be and he is hereby authorized, empowered and directed to demand, receiver and take charge of all properties of the debtor wheresoever situated, and to continue the operations of its business and properties in the usual and due course of business; to pay all obligations incurred by him in the ordinary course of business, but that no new ventures are to be undertaken or unusual expenditures made except upon the orders of this Court.

And it is further ordered that said debtor and J. C. Clopton and Bullock Hyder, receivers appointed by the District Court of Travis County, 126th Judicial District of Texas, and any and all other persons having control or possession of any of the properties or estate of said debtor, forthwith deliver to said trustee herein appointed all of the property, assets and effects of debtor now in the possession or control of them or either of them, and that said debtor and all other persons, firms, corporations, and all creditors of said debtor as well as each of their attorneys, agent and servants and all sheriffs, marshals and other officers, deputies and their

[fol. 41] employees be and they are hereby jointly and severally restrained and enjoined from removing, transferring or otherwise interfering with the property, assets and effects of the above named debtor, and from prosecuting, executing or suing out of any Court any process, attachment or other writ for the purpose of taking possession, impounding or interfering with any property, assets or effects of the said debtor, and from molesting, disturbing or interfering with the trustee named and appointed herein and hereby in the discharge of his duties.

It is further ordered that a hearing shall be held on the 13th day of January, 1936 at 10:00 a. m., in the United States District Court room in the City of Fort Worth, Texas, at which time and place all creditors and stockholders may appear and be heard in reference to debtor's proceedings for corporate reorganization and in reference to Debtor's petition, the continued possession of said properties of Debtor in the hands of said trustee, and such objections, if any there be, to the pursuing of said proposed corporate reorganization.

It is further ordered that said trustee shall, upon qualification immediately give notice of the time and place of said hearing herein ordered, by publishing once a week for two consecutive weeks prior to the date of said hearing a notice thereof in Fort Worth Star Telegram, a newspaper of general circulation published in Fort Worth in the County of Tarrant, State of Texas, and shall in addition thereto, give notice to all persons, both creditors and stockholders, whose interests may be affected by said proposed plan of reorganization by mailing to them and each of them at their last known address a copy of this order.

It is further ordered that the trustee herein named shall file schedules and such information as is available to him to disclose the conduct of the Debtor's affairs and the fairness of the proposed plan of reorganization.

It is further ordered that the trustee shall prepare and file a list of all known creditors of or claimants against the [fol. 42] Debtor or its properties, and the amounts and character of their debts, claims and securities, and the last known post office address or place of business of each creditor or claimant.

It is further ordered that the claims and interests of creditors shall be filed with the trustee within thirty days

from the date of this order, and after which no such claim or interest may participate in this plan, except on order for cause shown, which claim and interest filed shall state the amount of the debt or claim, the name and address of the creditor or claimant, the security, if any, to which shall be attached a copy of any contract or instrument evidencing such security, all duly verified.

(Signed) James C. Wilson, United States District Judge.

Filed 18th day of December, 1935. Geo. W. Parker, Clerk, by Anna H. Powers, Deputy.

I hereby certify that the foregoing is a true copy of the original thereof now in my office. Attest: Dec. 18, 1935.

Geo. W. Parker, Clerk, by C. B. Buckley.

IN UNITED STATES DISTRICT COURT

NOTICE TO CREDITORS, ETC.

To the Creditors of Trinity Refining Company:

In compliance with the order of the Court appointing me trustee of the properties of Trinity Refining Company, I herewith attach a copy of such order.

You are requested to forthwith and within thirty days from the date of the order, December 18th, 1935, prepare and mail to me, David Donoghue, Trustee, Fort Worth [fol. 43] National Bank Building, Fort Worth, Texas, a statement showing the following:

(a) The amount of your debt or claim, against either Trinity Refining Company or Lone Star Refining Company.

(b) The kind of security, if any, to such debt or claim.

(c) A copy of any contract or instrument evidencing such security.

(d) Your present correct name and address.

All of which to be duly sworn to.

David Donoghue, Trustee.

December 23rd, 1935.

IN UNITED STATES DISTRICT COURT

[Title omitted]

PLEA TO THE JURISDICTION AND MOTION TO DISMISS DEBTOR'S PETITION FOR REORGANIZATION AND MOTION FOR RESCISSION OF THE ORDER OF THIS HONORABLE COURT ENTERED AND FILED DECEMBER 18, 1935.

To said Honorable United States District Court:

Appearing specially and only for the purposes hereinafter stated, come J. C. Clopton and Bullock Hyder, the [fol. 44] duly appointed, qualified and acting receivers heretofore appointed by the District Court of Travis County, Texas, 126th Judicial District of Texas, and file their plea and motion to the jurisdiction of this Honorable Court, in response to an order by this Court and notices issued by order of this Court directing them to deliver possession and control of the properties and estates of said debtor over to the Honorable David Donoghue, heretofore appointed by this Honorable Court as trustee, and in this connection respectfully show to the Court:

I

That it appears from the petition filed by debtor that debtor Trinity Refining Company is a corporation organized and existing under and by virtue of the laws of the State of Texas, and that no authority for the filing of the petition for reorganization under section 77b of the bankrutpcy act of 1898, as amended, has been authorized by the requisite number of the Board of Directors of said corporation, as required by the laws of the State of Texas and laws pertaining to bankruptcy; and as a consequence this Court has acquired no jurisdiction and the order approving the petition of debtor as being regularly filed should be vacated and the petition dismissed.

II

That this Honorable Court is without jurisdiction to demand of these receivers possession of the property seized and taken over originally by them under the orders of the Honorable District Court for the 126th Judicial District of Travis County, Texas, since they hold such prop-

erty as officers and agents of such Court, and that any summary order issuing out of this Court would cause such receivers to violate the orders of the State Court appointing them, and that they have no authority under the law to [fol. 45] surrender the property and estate held by them save by order of the Court appointing them; and that such turn-over order, if any be authorized under the law, should be directed, in the exercise of due comity existing between Courts of concurrent and coordinate jurisdiction, to the Judge of said Court, by petition of the trustee appointed by this Honorable Court directed to the Judge of said State Court for a release of the property held by the agents of said State Court.

III

That heretofore on the 12th day of October, 1935, the State of Texas by and through William McCraw, the duly elected, qualified and acting Attorney General of the State of Texas, entered suit in the District Court in and for the 126th Judicial District of Travis County, Texas, seeking the enforcement and collection of certain fines, penalties and interests incurred by the debtor herein and its stockholders, manager and agents, as result of numerous violations of the conservation laws of the State of Texas. That said State of Texas in seeking enforcement and collection of said fines, penalties and interest also was asserting and is still asserting a statutory lien upon all of the property, estate and appurtenances of said debtor and the foreclosure thereof to secure the payment of said penalties; and in such suit it is prayed that the sum of $791,000 in fines, penalties and interest be recovered of and from the Trinity Refining Company, debtor, and J. B. Sowell, T. W. Sowell and C. B. Sowell, and V. E. Jackson, doing business as Lone Star Refining Company; and that the statutory lien as provided for in Article 7065a, Sec. 7, R. C. S. of the State of Texas (Acts of 1933, 43rd Leg., p. 75, ch. 44, sec. 7) be foreclosed; and, further, that a receiver be appointed to take over, hold and operate said properties for the purpose of enforcing such fines, penalties and interest, and [fol. 46] the foreclosure of said lien. A copy of the petition and trial amendment filed by the State of Texas in said cause is attached hereto, marked "Exhibit 'A'" and

made a part hereof for all pertinent purposes. That in response to the prayer in said State's petition, notice was duly served upon the Trinity Refining Company, J. B. Sowell, T. W. Sowell, C. B. Sowell, Minor Pipe Line Company and V. E. Jackson, notifying said parties to come in on the — day of ——, A. D. 1935, and show cause why a receiver should not be appointed as prayed for and why injunction should not issue; and upon the day appointed for such hearing, the parties defendant in said suit came not, but appeared by counsel, said counsel stating substantially to the Court that there had been filed in the United States District Court in and for the Western District of Texas, a petition for the removal of said cause then pending in the 126 Judicial District Court of Travis County, Texas, by Trinity Refining Company, J. B. Sowell, T. W. Sowell, C. B. Sowell, Minor Pipe Line Company and V. E. Jackson.

The petition for removal alleged substantially that the enforcement of the statute of the State of Texas provides for the imposition of penalties for the violation of the conservation laws of the State of Texas, which statute and enforcement thereof was denying the Trinity Refining Company and J. B. Sowell, T. W. Sowell, C. B. Sowell, Minor Pipe Line Company and V. E. Jackson equal civil rights under the Constituteion of the United States and was denying to them the equal protection of the laws. That by reason of the filing of the petition for removal the State Court, to-wit, the District Court for the 126th Judicial District, Travis County, Texas, had no jurisdiction to proceed further in the matter.

Counsel for the Trinity Refining Company, J. B. Sowell, T. W. Sowell, C. B. Sowell, Minor Pipe Line Company and [fol. 47] V. E. Jackson, after making the above appearance and statement to the State Court, retired from the Courtroom. Thereupon, the Attorney General announced ready for trial and advised the Court that in his opinion the petition for removal was not well founded in the law, and as a consequence the mere filing of the petition could not operate as a hindrance to the State authorities and the State Court in proceeding to establish the State's claim for penalties by reason of the alleged violations in the petition filed in said cause. The District Court, after considering the matter, directed the State's attorney to proceed with the hearing.

The testimony of a number of witnesses was received by the Court, establishing the facts as alleged in the State's petition to the effect that numerous violations had been committed by debtor Trinity Refining Company, J. B. Sowell, T. W. Sowell, C. B. Sowell, Minor Pipe Line Company and V. E. Jackson against the conservation Laws of the State of Texas. At the conclusion of the hearing of evidence, the Court announced substantially that it was one of the most flagrant cases presented to him, showing violations of the conservation laws of the State of Texas, and that the case made by the State of Texas amply warranted the appointment of the receivers to take charge of the properties of the Trinity Refining Company.

The Court accordingly entered its order appointing the Honorable J. C. Clopton and Honorable Bullock Hyder receivers to take over all of the properties, assets and estates of the Trinity Refining Company, J. B. Sowell, T. W. Sowell, C. B. Sowell, Minor Pipe Line Company and V. E. Jackson, doing business as Lone Star Refining Company, a copy of said order appointing said receivers being hereto attached, marked "Exhibit 'B' " and made a part hereof for all pertinent purposes.

[fol. 48] As to the proceedings had and the record of the testimony taken before the District Court of the 126th Judicial District of Travis County, Texas, these receivers stand ready to tender a certified copy of same into this Court at the proper time.

That subsequent to the appointing of the receivers by the State Court, the defendants in said cause procured the issuance of a notice out of the United States District Court in and for the Western District of Texas, sitting at San Antonio, notifying the Attorney General and other State officers to appear in said Court on the — day of —— and show cause why an injunction should not issue restraining the further prosecution of the penalty suit in the State Court. Upon the day set for the show cause hearing, the State answered by filing a plea for the jurisdiction, asserting that the petitioners for removal were not afforded the privilege of removal under Section 74, U. S. C. A., and the Honorable R. J. McMillan, after hearing both sides, announced that in his opinion the petition for removal was not well founded, and that unless counsel for petitioners could at a subsequent date convince him other-

wise, he would enter an order remanding the cause to the State District Court. That on the — day of ——, 1935, the petitioners for removal joined in a motion to the United States District Court at San Antonio, moving for a remand of the cause attempted to be removed from the State Court. The Court, after considering the motion, entered its order remanding the cause to the State District Court. A copy of the petition for removal, a copy of the joint motion to remand, and a copy of the order remanding said cause, are attached hereto and marked "Exhibits 'C', 'D' and 'E', respectively.

That, after the remand of said cause, said receivers immediately qualified by giving the required bond, and took charge of the properties and estates and were in charge [fol. 49] of said property and estate of the Trinity Refining Company, J. B. Sowell, T. W. Sowell, C. B. Sowell, Minor Pipe Line Company and V. E. Jackson until summarily dispossessed by the Honorable David Donoghue, trustee under order of this Honorable Court.

IV

That on December 14, 1935, the State of Texas filed a suit by verified petition in the District Court for the 98th Judicial District of Travis County, Texas, in Cause No. 56,472 against V. E. Jackson, Trinity Refining Company, J. B. Sowell, T. W. Sowel, C. B. Sowell and Minor Pipe Line Company, by virtue of House Bill 247, passed by the 43rd Legislature of the State of Texas, as amended by House Bill 749, Acts of the 44th Legislature of the State of Texas, seeking the recovery of taxes, penalties and interest upon the properties of said parties, the sum of $104,084.47 incurred by reason of the activities of said parties in refining, manufacturing, producing, blending and compounding motor fuel and by making the first sale, distribution and use of motor fuel within the State of Texas, and by reason of the activities of such parties, a tax of four cents per gallon for each gallon of gasoline sold by said parties was incurred. The State of Texas in that suit was also seeking the foreclosure of a lien which by law is made first and prior to any and all other existing liens, upon all of the properties of any distributor of motor fuel as defined by law. That upon the filing of said petition, application was made for the appointment of a receiver. The

Judge of said Court, however, declined to appoint receivers to take charge of the properties and estates of said parties, for the reason that the receivers appointed by the District Court for the 126th Judicial District, Travis County, Texas, were then in possession of the properties and estates as a result of the filing of the suit of the State [fol. 50] of Texas against V. E. Jackson, Trinity Refining Company, J. B. Sowell, T. W. Sowell, C. B. Sowell and Minor Pipe Line Company, in the District Court of the 98th Judicial District of Travis County, Texas. That on the 8th day of January, 1936, it appearing to the Judge of the District Court for the 126th Judicial District of Travis County, Texas, upon motion, that there was on file in said Court Cause No. 56,476, wherein the State of Texas as plaintiff and V. E. Jackson, Trinity Refining Company, J. B. Sowell, T. W. Sowell, C. B. Sowell and Minor Pipe Line Company are defendants, the same being the suit originally filed in the District Court for the 98th Judicial District of Travis County, Texas, wherein the State of Texas was seeking recovery of Taxes, penalties and interests against V. E. Jackson, Trinity Refining Company, J. B. Sowell, T. W. Sowell, C. B. Sowell and Minor Pipe Line Company, and the Court after considering the motion of the State of Texas, entered an order appointing the Honorable J. C. Clopton and Bullock Hyder, receivers of the properties and assets of V. E. Jackson, Trinity Refining Company, J. B. Sowell, T. W. Sowell, C. B. Sowell and Minor Pipe Line Company, as prayed for in cause No. 56,476; and further adjudged and decreed that no additional bond should be given by said receivers and that the bond originally given by them in Cause No. 56,252 should be adequate. A copy of said order is attached hereto, marked "Exhibit 'F'" and referred to and made a part hereof for all pertinent purposes.

V

That by reason of the above, in the District Court of the 126th Judicial District of Travis County, Texas, and by reason of the filing of the suits by the State of Texas for the collection of taxes, fines, penalties and interests against Trinity Refining Company, V. E. Jackson, J. B. Sowell, [fol. 51] T. W. Sowell, C. B. Sowell and Minor Pipe Line Company, and the assenting of a lien and the foreclosure thereof upon the properties and estates of the said debtor

and the subsequent appointing of receivers and taking over of the properties and estates by the receivers so appointed, the properties and estates of the debtor are now in the exclusive jurisdiction of the Court of the State of Texas, and the existence of a valid statutory lien deprives this Honorable Court of jurisdiction to withdraw said properties and estates of the debtor from the Court of the State of Texas.

Wherefore, these receivers pray that by reason of the above, this Court should decline to take jurisdiction of this cause and the debtor's petition for reorganization should be disapproved and the petition dismissed, and that the summary order heretofore entered by this Court should be rescinded, and that the trustee appointed by this Court be ordered to deliver possession of the estates and properties into the hands of the receivers duly appointed by the District Court in and for the 126th Judicial District of Travis County, Texas.

William McCraw, Attorney General of Texas, William C. Davis, Assistant Attorney General; W. J. (Dick) Holt, Assistant Attorney General; T. F. Morrow, Assistant Attorney General; Joe Sharp, Assistant Attorney General, Attorneys for the State of Texas. Ben Greenwood, Attorney for Receivers.

[fol. 52] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION TO DISMISS, ETC.

To the Honorable Judge of said Court:

Now comes the State of Texas, by and through William McCraw, its duly elected, qualified and acting Attorney General, Without waiving its plea to the jurisdiction, and without submitting to the jurisdiction of this Court, and appearing herein solely in opposition to the approval of debtor's, Trinity Refining Company, plan for corporate reorganization, and joined herein by Bullock Hyder and J. C. Clopton, Receivers of the assets of the Trinity Refining Company, in Cause No. 56,252 in the 126th Judicial District

Court of Travis County, Texas, and joined by Ben Greenwood, attorney for said Receivers under appointment of said State Court, respectfully show this Honorable Court that said plan of reorganization should not be approved, and that this Court should not assume jurisdiction of the res of this litigation, constituting the assets of the Trinity Refining Company, under Section 77b, of the Bankruptcy Act of the U. S. Code Annotated for the following good and sufficient reasons:

I

It is shown that no notice of the filing of debtor's pleading in this cause was given to the State of Texas, J. C. Clopton and Bullock Hyder, as Receivers, and Ben Greenwood as Attorney for said Receivers, prior to the filing of same; and no notice was given to them prior to the action [fol. 53] or entering of orders of this Honorable Court under date of the 18th day of December, 1935; and that no opportunity has presented itself prior to said order and prior to the action of this Honorable Court, for these parties to assert such rights, equities, claims, demands and liens in opposition to said plan heretofore.

II

That if it be considered by this Honorable Court that the State of Texas is not a creditor in that same is a sovereign, in that event it is shown that J. C. Clopton and Bullock Hyder have been duly appointed as Receivers of the properties named in debtor's bill by a Court of competent jurisdiction, and that Ben Greenwood has been appointed the Attorney of said Receivers by a Court of competent jurisdiction, to-wit the 126th District Court of Travis County, Texas, prior to the filing of debtor's bill in this cause; a true copy of the State of Texas pleading and supplemental pleading and order appointing said Receivers are attached hereto, marked "Exhibit A", and made a part of this pleading; and that there has accrued to said J. C. Clopton, Bullock Hyder and Ben Greenwood, by virtue of said appointment and services performed, a sum in excess of $1000.00 to each the said J. C. Clopton, Bullock Hyder, and Ben Grenwood, and that they and each of them in the event of the approval of debtor's plan by this Honorable Court constitute claimants with claims accrued for which they have liens in excess of $3000.00.

III

It is shown that J. C. Clopton and Bullock Hyder have, to-wit on the 8th day of January, 1936, have by the 126th District Court of Travis County, Texas, in Cause No. 56,476, wherein the State of Texas is plaintiff and V. E. [fol. 54] Jackson, et al., are defendants, a Court of competent jurisdiction, been appointed Receivers of the Properties of Trinity Refining Company, Incorporated, a corporation, operated by V. E. Jackson in the trade name of Lone Star Refining Company, as is shown by a true copy of the order of said 126th District Court appointing them, which is attached hereto, marked "Exhibit B" and made a part hereof.

IV

It is shown that debtor's plan, as represented by its pleading and by the true facts which exist, is not feasible, and that this Court should take no further jurisdiction of this suit, and the same should be dismissed for the following good and sufficient reasons:

A. That Trinity Refining Company is totally insolvent in that its assets represented by its stock as set forth in debtor's bill have heretofore been pledged to Mistress Lucille McMurray, survivor of the community estate of herself and R. J. McMurray, to secure the payment of a debt in the sum of $2500.00, as shown by the supplemental petition of the State of Texas hereinabove referred to, and by true copy of a petition duly verified, filed in Cause No. 6261a in Special District Court of Smith County, wherein Mistress Lucille McMurray, survivor of the community estate of herself and R. J. McMurray, deceased, et al., are plaintiffs, and T. W. Sowell, et al., are defendants, a true copy of which said petition is attached hereto, marked "Exhibit C" and made a part hereof.

B. Because debtor's plan discloses that debtor has a net worth of $144,027.44, based upon a tax lien to the State of Texas in the sum of $69,334.04, whereas in truth and in fact debtor owes the State of Texas the sum of $323,664.03, as [fol. 55] fully shown by certified copy of the State of Texas first amended original petition in Cause No. 56,476, to which is attached an audit of the account of the tax lien and penalties due by debtor to the State of Texas, which said peti-

tion and audit are attached hereto, marked "Exhibit D" and made a part hereof.

In this connection it is shown that the State of Texas' claim is a liquidated claim, for which the State has a statutory lien, prior to any and all other liens by virtue of H. B. No. 247 of the 43rd Legislature as amended by H. B. No. 749 of the 44th Legislature of the State of Texas, and also under the provisions of sec. 77b and 104 of Title 11 of the United States Code Annotated; that based upon the total assets as reflected by debtor's bill and its net worth, $144,027.44, deducted from its debt, including taxes, penalty and interest due the State of Texas in the sum of $323,664.03, discloses that debtor is insolvent, and based upon this claim alone, together with the other claims set forth in debtor's bill that debtor owes a valid and subsisting claim for which the State of Texas has a lien of $110,302.55 in excess of its total net worth as reflected by debtor's petition.

In this connection it is shown that L. A. Rankin is Secretary of the Trinity Refining Company, as reflected by debtor's petition, and has compiled an audit of assets and report of operations of the Trinity Refining Company as of December 1, 1935, being the period reflected by the figures set forth in debtor's petition wherein the assets of Trinity Refining Company, as reflected by said report of operations and audit of assets, discloses that the current assets of the Trinity Refining Company as of said date are $5,461.63, and the current assets as disclosed by debtor's petition are $77,608.96, leaving a discrepancy or difference as disclosed by the figures of said officers of said company of $72,147.33 as of the same date, to-wit December 1, 1935. [fol. 56] That the fixed assets as disclosed by debtor's petition on December 1, 1935, are $267,013.44; whereas the audit of the said L. A. Rankin as officer of said Company as of the said December 1, 1935, discloses the fixed assets of said Trinity Refining Company to be $244,410.13; disclosing a discrepancy of $22,603.31, as reflected by said audit of December 1, and debtor's petition, all of which is fully shown by a true copy of said audit and report of operations as of December 1, at 7 A. M., 1935, submitted herewith for the Court's consideration.

It is further shown in this connection that in debtor's petition it set forth as a representation to this Court that a

tax account and lien is due the State of Texas in the sum of $69,304.04; whereas in truth and in fact, debtor owes the State of Texas the sum of $323,664.03 for taxes and penalties and interest under the Motor Fuel Law, for which the State has a lien as fixed by the statutory laws of the State.

In this further connection it is shown that if debtor had paid the taxes due the State of Texas over the six months period as reflected by debtor's petition, wherein it shows a net earning of $109,763.42 for said period, that the debtor, instead of said earning would have shown and did actually sustain a loss of $85,533.46 over said six months period.

It is further shown in this connection that the figures compiled and shown in debtor's petition are based upon crude oil at $1.00 per barrel. That since the filing of this bill, and upon the presentation of this application and contest, that crude oil has advanced to substantially $1.15 per barrel in the East Texas Field, such as is average for the operation of Trinity Refining Company. That there has been substantially no advance in the price of products of crude petroleum oil, and that the continued operation of said plant on legal and allowable oil at $1.15 per barrel, [fol. 57] with no advance in the price of products thereof causes a wider spread, and offers less opportunity for profit than upon the operation of said refinery with oil at $1.00 per barrel.

C. That said plan is not feasible because the debtor in truth and in fact was indebted to the State of Texas for Motor Fuel taxes a sum of $323,664.03, and that in addition thereto, as shown by debtor's petition, there is due and owing numerous other creditors the aggregate sum of $131,260.92, which added to the claim for taxes by the State of Texas, totals $454,924.95, and that applying debtor's plan for reorganization found in paragraph four of "Plan of Reorganization" and giving each creditor a certificate for "the amount of the debt of the creditor at the date of the issuance of said certificate," and paying such amounts in sixteen equal monthly installments, together with interest as it accrues, and giving preference to the claim for taxes by the State of Texas, as provided by law, the monthly installment payable to the State of Texas would be in the amount of $20,229.00.

That applying the plan proposed by debtor to the total amount of creditor's claims, to-wit, $454,924.95, namely,

being payable in sixteen monthly installments, the monthly demand by all creditors upon the debtor, both secured and otherwise, would be $28,432.81. Protestants would show that by taking debtor's own figures said plan is not feasible, for in paragraph three of debtor's petition it is alleged "the operation of the properties of the debtor under experienced business management should net between fifteen and twenty thousand dollars per month. Giving the debtor the benefit of the maximum earning capacity per month, it would be impossible for debtor to meet the deficiency, to-wit $8,432.81, per month.

[fol. 58] D. Said plan is not feasible for the total net worth of debtor as shown under paragraph four, hearing, "Liability" is $144,027.44 as of December 1, 1935; and the total current liability of debtor as of December 1, 1935 aggregates $323,664.03. Accordingly, giving debtor the benefit of his alleged figure, to-wit, $144,027.44 as being its net value as of the present market, the debtor is in contemplation of the Bankrupt Law hopelessly insolvent, since its assets taken at a fair value are not sufficient to pay its obligations.

E. In addition to the above it is shown that the State of Texas in Cause No. 56,252, has filed its suit in the 126th District Court of Travis County, Texas, as hereinabove alleged, for penalties and fines due the State of Texas by the debtor jointly and severally with other defendants therein named in the sum of $791,000.00. That as alleged in said pleading the State of Texas has a lien upon the properties of debtor for the payment of said sum of $791,000.00. That said debt is in no sense taken into consideration by debtor in its application and petition before this Honorable Court. In this connection it is shown that the State of Texas' claim of $791,000.00 is a valid and substantial claim for said sum of money, for which the State has heretofore in a Court of competent jurisdiction offered proof of the validity of the allegations made in the State of Texas pleading in said cause in hearing before the Judge of said Court on the State of Texas application for the appointment of receivers therein. That a record of the State of Texas debt has been reduced to proof in the said 126th District Court, wherein it is shown, and which said record and proof is submitted herewith for the consideration of this Honorable Court, that the Trinity Refining

Company through its officers, agents and employees, together with the other defendants named in said cause No. 56,252, entered into a conspiracy to defeat the purpose of [fol. 59] the conservation laws of the State of Texas; and as proved in said cause, and which said proof is herewith submitted, the debtor in this cause through its agents and servants, ran to its stills at the Trinity Refining Company substantially 1,156,723 barrels of crude petroleum oil and processed same, deriving therefrom in excess of forty-five per cent of gasoline, upon which a substantial portion of the taxes due the State of Texas under the Motor Fuel Law of the State were not paid; and in addition thereto these protestants respectfully show to this Honorable Court as revealed by the record made in the 126th Jndicial District Court of Travis County, Texas, a large portion of said crude oil was produced and used without the payment of the gross production tax provided by the State of Texas, and produced and refined through debtor's refinery, without paying the royalty interest due the respective royalty owners. In this connection it is shown that the operation of debtor's refinery and the receipt and sale of the products refined and sold therefrom has been in violation of the laws of the State of Texas and without paying the respective participate in the proceeds thereof, a large sum of money, the exact amount of which is unknown to these protestants, but within the knowledge of the officers and operatives of the debtor herein. That the profits, net worth, and assets of the debtor as reflected by its petition and based upon the operation of debtor's refinery in an unlawful manner and in a manner which discloses a profit from its operation, which will not be disclosed upon its lawful operation.

In this further connection it is shown that the plan offered by the debtor for this Court's consideration must of necessity contemplate the lawful operation of its refinery, and when said refinery is operated by this Honorable Court under a trusteeship or otherwise, the royalty due the persons owning the wells with which debtor's refinery is connected must be paid, the gross production tax must be [fol. 60] paid, and the gasoline or motor fuel tax must be paid; and these protestants respectfully submit that from the record as disclosed in Court, herewith submitted for this Court's consideration, that the Trinity Refining Company cannot by virtue thereof show a profit sufficiently feasible

to discharge the debts of debtor in line with the plan set forth in debtor's bill.

In this further connection it is shown that the record made in the 126th District Court as aforesaid discloses a wanton and wilful violation of the proration laws as set forth in Title 102 and amendments thereto of the Revised Civil Statutes of Texas. That by virtue thereof the claim of the State of Texas in the sum of $791,000.00 for a substantial claim, supported by proof for which the State has a lien on the statutory basis of a sum not to exceed $1000.00 for each and every violation. That said violations are susceptible of proof and have been proved in a Court of record, for all of which reasons protestants respectfully show to this Court that in addition to the sum of $454,924.95, there exists the State of Texas' additional claim of $791,000.00, making a total indebtedness for which debtor is liable in excess of $1,245,000. That based upon debtor's admitted net worth of $144,027.44, said plan submitted by debtor for this Court's consideration is in no sense feasible to discharge its obligation.

F. That said plan submitted by debtor should not be approved by this Court because the State of Texas has a lien upon all of the products and properties of debtor as hereinbefore alleged, that debtor owns certain petroleum oil and petroleum oil products as reflected by its petition. That the refining of said oil and the sale of said products by this Honorable Court under a trusteeship is depriving the State of Texas of its property and/or property subject to the State of Texas' debt; further the operation of said refinery [fol. 61] and the paying of salaries and operating expenses through the authority of this Honorable Court is being paid out of the proceeds derived from the oil and products upon which the State of Texas has a lien for its debt.

G. That said plan should not be approved and this Court's continued operation of said properties for the reason that the laws of the State of Texas, to-wit, Ch. 44, p. 75, of Article 7065a, sub-section 6, Revised Civil Statutes of the State of Texas, of the 43rd Legislature as amended by the 44th Legislature in H. B. 749, provides that upon the failure to pay a tax due, that a distributor of gasoline or motor fuel is unauthorized to sell the same, and said law provides for forfeiture of the permit issued by the Comptroller. In this connection it is shown that permit to sell

motor fuel as a distributor has been forfeited. That no permit or authorization under the laws of the State of Texas has been issued to the Trustee in this cause, nor bond has been given by the Trustee in this cause as provided by the statutory law of the State *of* aforesaid. In this connection it is alleged on information and belief that the Trustee, his agents, servants and employees have been selling motor fuel from the plant of debtor at Gladewater, Texas. That the operation of said plant and the sale of motor fuel therefrom is wholly unauthorized by law in that the Trustee in this cause has not posted a bond payable to the State of Texas and conditioned for the full, complete and faithful performance of all the conditions and requirements of what is commonly known as the Motor Fuel Act of the State of Texas; and no such bond has been approved by the Comptroller of the State of Texas with the approval of the Attorney General, providing for the payment of all such taxes, penalties and interest at Austin, Texas, for the sale of Motor Fuel.

H. This plan is not feasible, and the same has not been filed in good faith, as contemplated by section 77b of Title [fol. 62] 11 of the Bankruptcy Act, for the reason that the petition filed herein, which purports to be the petition of debtor, Trinity Refining Company, a corporation, alleged to be organized under the laws of the State of Delaware, with a permit to do business in Texas, for the reason that the filing of said petition was not first authorized by proper resolution of the Board of Directors of said corporation as required by the laws of the State of Texas and the laws relating to the subject of bankruptcies; and that the signing of said petition for reorganization by T. W. Sowell, purporting to be the President of debtor, is not authorized by law, and that the signing of said petition of debtor by the purported stockholders of said corporation is not effective under the law to give this Court jurisdiction to administer the affairs under section 77b, Title 11, Bankruptcy Act, or under the laws of the State of Texas.

V

Protestants respectfully say to this Honorable Court that inasmuch as the State of Texas has by law a prior and paramount lien securing the taxes, fines and penalties due it by reason of the numerous violations established by the

State of Texas in its suit against debtor and others in the 126th Judicial District Court of Travis County, Texas, it should be permitted by this Court to go hence without further stay by the hand of this Honorable Court, and to proceed to final judgment in the suits brought by the State of Texas against debtor and others pending in the Court of Travis County, Texas, so that it be entitled to finally establish its claims. In this connection protestants say that if the claims as above set out, both liquidated and otherwise, be established against debtor in the Courts of the State of Texas, and preference be given to such claims as required both by the statutory law of the State of Texas and the laws [fol. 63] relating to bankruptcies, it will be utterly impossible for debtor to be able to ever reorganize under section 77b, but that such finally established claim as above set forth has and will render debtor totally and hopelessly insolvent as contemplated by the laws relating to bankruptcies; and that if this be the case the protestant, State of Texas, is entitled to have the properties and estates of debtor released from the custody of the Bankruptcy Court and replaced in the custody of the Receivers heretofore appointed by the District Court, 126th Judicial District, Travis County, Texas, so that the same may be held subject to the orders of that Court pending final outcome of the suits therein pending.

In view of the above, protestants respectfully show:

1. That the "Plan of Reorganization" filed herein offers no substantial relief.

2. That it is not feasible.

3. That it is not equitable. That its promises are indefinite and uncertain; that it shows an effort on the part of the debtor to escape penalties justly imposed by the Sovereign State of Texas for numerous and flagrant violations of the conservation laws of the State of Texas.

4. That the debtor has come into a Bankruptcy Court, sitting as a Court of Equity, with unclean hands.

Wherefore, these protestants pray that the petition of the debtor be dismissed, or that the proposed plan be rejected, and that the Trustee heretofore appointed by this Court be forthwith removed from the management, pos-

session and control of the properties and estates of the debtor; and that an order be entered by this Court directing said Trustee to forthwith place the properties and [fol. 64] estates of the debtor into the hands of J. C. Clopton and Bullock Hyder, heretofore appointed by the District Court, 126th Judicial District, Travis County, Texas.

In the alternative it is prayed that this Honorable Court enter its order granting leave to the Attorney General of the State of Texas to proceed in the District Court, 126th Judicial District, Travis County, Texas, in Causes Numbers 56,252 and 56,476, without stay, let or hindrance, so that said causes may proceed to final judgment looking to the establishment of the claims for taxes, fines and penalties as prayed for in said suits; that the administration of the estate by the Trustee be stayed during said period, and that upon establishing said claims and debts, then it be determined that Trinity Refining Company be insolvent. And if this Court should in its discretion then desire to retain jurisdiction of the properties and assets of the debtor, that it be ordered that the Trustee appointed by this Court be ordered to liquidate the business and assets of this debtor; and to proceed according to Section 45, Title 11, U. S. C. A., as provided for in Section 77b, Title 11, U. S. C. A., and that such claims for taxes, fines, and penalties of the State of Texas be classified according to Section 104, Title 11, U. S. C. A.; and for such other relief and equity that protestants should be entitled.

William McCraw, Attorney General of Texas. W. J. (Dick) Holt, Wm. C. Davis, T. F. Morrow, Assistants Attorney General. Ben Greenwood, Attorney for J. C. Clopton and Bullock Hyder.

[fol. 65] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR RESCISSION OF ORDER

Now comes the State of Texas by and through William McCraw, duly elected, qualified and acting Attorney General of the State of Texas, and respectfully moves this Honorable Court to rescind so much of his order heretofore

entered in this cause on the 18th day of December, 1935, wherein it is ordered that the receivers appointed by the District Court of the 126th Judicial District of Texas, the attorneys and all other persons are restrained from prosecuting suits or attempting to take possession of the property of the debtor, and permit the Attorney General of the State of Texas to proceed in the District Court 126th Judicial District Travis County, Texas, in causes Numbers 56252 and 56474 without stay, let or hindrances, so that said causes may proceed to final judgment, looking to the establishment of the State's claims for taxes, fines and penalties as prayed for in said suits; and that the administration of the estate of the debtor by the trustees appointed by the Court in this proceeding be stayed during said period, and that upon the establishment of said claims for taxes, fines and penalties any judgment to that effect be certified to this Honorable Court for observance and classification looking to the satisfaction thereof.

And in this connection it is respectfully shown to the Court that under the Statutes of the State of Texas with respect to the recovering of taxes, fines and penalties imposed upon persons violating the conservation laws of the State of Texas, jurisdiction for the trial of such causes is [fol. 66] laid in Travis County, State of Texas, and that in a trial of the causes above referred to it is necessary that the permanent records of the Railroad Commission of Texas, the administrative agency whereby the conservation laws of the State of Texas are put into force and effect, will have to be removed to this Honorable Court if it should find that the establishment of the claim for taxes, fines and penalties should be heard by this Court or by a Master appointed by this Court. That the movement of such records will be a cumbersome procedure and will impose inconveniences upon all parties connected with said suits, and that the hearing of such claim for taxes, fines and penalties by this Court or by a Master appointed by this Court would be thoroughly impracticable, in addition to the fact that the State of Texas, under the laws of the State — entitled to a trial of said suits in its own forums as provided by law, and that the appointment of a Master by this Honorable Court to hear such suits or claims would deprive the State of its constitutional right to a trial by jury in such matters.

It is further represented in this connection that it is contemplated by the statutory laws of the State of Texas with reference to suits by the State of Texas seeking the recovery of taxes, fines and penalties for the violation of the conservation laws of the State of Texas be heard by Courts of competent jurisdiction, and that the same are to be heard according to the rules of law with respect to judicial trials and proceedings.

Wherefore, these movants pray that this Honorable Court enter its order rescinding that part of its order entered on the 18th day of December, 1935, in the respects above pointed out, and that the State be authorized to proceed in the prosecution of its suits in the District Court 126th Judicial District Travis County, Texas, or such other District Court in Travis County, Texas as conditions may [fol. 67] require; and that all proceedings looking to the approval of debtor's proposed plan be stayed pending the entry of a final judgment in said causes; and that a reasonable time be set in which said causes are to be heard and tried and reduced to judgment.

William McCraw, Attorney General. Pat M. Neff, Jr., T. F. Morrow, William C. Davis & W. J. Holt, Assistants Attorney Generals.

IN UNITED STATES DISTRICT COURT

No. 1939

In the Matter of TRINITY REFINING COMPANY, a Corporation, Debtor

In Proceedings for Corporate Reorganization

JUDGMENT

On the 13th day of January, A. D. 1936, came on to be heard the matter of the petition of Trinity Refining Company, a corporation, petitioning for corporate reorganization under Section 77b of the Bankruptcy Act of 1898 as amended, in pursuance of the order of this Court heretofore entered on the 18th day of December, 1935, and the hearing was thereupon continued and passed over to the 14th day of January, 1936, at 3:00 o'clock in the afternoon,

at which time there appeared the Debtor by its officers and by counsel, David Donoghue, the Trustee heretofore appointed in this cause, in person and by counsel, and the [fol. 68] following creditors and parties at interest: Atlas Supply Company, Mosher Steel Company, General American Tank Car Company, Clark Bros. Engine Company, Oil Well Supply Company, J. B. Beaird Company, Hall Lumber Company, Collector of Internal Revenue, all by counsel, and the State of Texas by W. J. Holt, Pat M. Neff, Jr., T. F. Morrow and Wm. C. Davis, Assistant Attorneys General of the State of Texas, and J. C. Clopton and Bullock Hyder, receivers, in person and by their counsel.

Thereupon David Donoghue, Trustee heretofore appointed in this cause, presented evidence of the fact that notice had been given in the manner ordered by the Court on December 18th, 1935, to all persons, both creditors and stockholders.

Thereupon the State of Texas and J. C. Clopton and Bullock Hyder, by counsel, presented their plea to the jurisdiction of the Court and their motion to dismiss the petition heretofore filed by the Debtor in this cause, and the Court having heard and considered the same and having heard argument of counsel thereon, is of the opinion that the same should be in all things overruled and denied, and it is, therefore,

Ordered that the plea of the State of Texas and J. C. Clopton and Bullock Hyder to the jurisdiction of the Court and the Motion of the State of Texas and J. C. Clopton and Bullock Hyder to dismiss the petition of the Debtor heretofore filed in this cause be and the same is in all things overruled and denied; to which action of the Court the State of Texas and J. C. Clopton and Bullock Hyder, through their counsel, then and there in open Court excepted.

Thereupon David Donoghue, Trustee herein, presented to the Court a report as directed by the Court's order of [fol. 69] December 18th, 1935, and there was then considered the appointment of a permanent Trustee herein. The Court, having heard argument of counsel thereon, is of the opinion that the appointment of David Donoghue as Trustee of the estate of the above named Debtor should be made permanent, and it is, therefore,

Ordered that the appointment of David Donoghue as Trustee of the estate of the above named Debtor be and the said is hereby made permanent, and that the bond of the said Trustee in the sum of Ten Thousand ($10,000.00) Dollars, heretofore given by said Trustee for the faithful performance of his duties as Trustee and filed in these procedings, shall stand; that the order of this Court dated the 18th day of December, 1935, be and the same hereby is continued in full force and effect, and that the trustee be and hereby is authorized to administer the assets and conduct the business of Debtor's estate herein and to manage and operate the same and to receive and collect the issues and profits from the business and properties of the Debtor's estate, subject to the provisions of and with all the powers granted by the said order.

Whereupon the Debtor, by its counsel, presented the plan for reorganization, and there appeared Mosher Steel Company, the Collector of Internal Revenue, the State of Texas, J. C. Clopton, Bullock Hyder and Ben Greenwood and presented their opposition and objections to the approval of said plan. The Court, having heard the objections aforesaid and the argument of counsel thereon, is of the opinion that the objections should in all things be overruled and denied and the plan as proposed approved, and it is, therefore,

Ordered that the objectons filed by Mosher Steel Company, the Collector of Internal Revenue, the State of Texas, J. C. Clopton, Bullock Hyder and Ben Greenwood to the proposed plan of reorganization be and the same are hereby [fol. 70] in all things overruled and denied, and the plan of reorganization heretofore filed in this cause by the Debtor be in all things approved and confirmed, subject to such other and further orders as may be made by this Court with respect thereto; to which action of the Court in overruling the objections and approving the plan, Mosher Steel Company, the Collector of Internal Revenue, the State of Texas, J. C. Clopton, Bullock Hyder and Ben Greenwood in open Court excepted.

Thereupon came on to be heard the motion of the State of Texas, by and through William McCraw, its Attorney General, to rescind so much of the order of this Court entered on the 18th day of December, 1935, wherein it is ordered that the receivers appointed by the District Court

for the 126th Judicial District of Texas, the attorneys and all other persons are restrained from prosecuting suits or attempting to take possession of the property of the Debtor and asking that this Court permit the Attorney General of the State of Texas to proceed in the District Court for the 126th Judicial District of Texas, Travis County, Texas, in Causes No. 56252 and 56476 without stay, let or hindrance so that said causes may proceed to final judgment and that the State's claims for taxes, fines and penalties as prayed for in said suits be fixed and established in said state causes, and that all proceedings in this Court looking to the approved of the Debtor's proposed plan of reorganization be stayed pending the entry of said final judgments in said state causes. The Court, having considered said motion and having heard the evidence and argument of counsel thereon, is of the opinion that said motion should be overruled and denied, and it is, therefore,

Ordered that the motion of the State of Texas, by and through Wliliam McCraw, its Attorney General, to rescind [fol. 71] so much of the order of this Court entered on the 18th day of December, 1935, wherein it is ordered that the receivers appointed by the District Court for the 126th Judicial District of Texas, the attorneys and all other persons are restrained from prosecuting suits or attempting to take possession of the property of the Debtor and asking that this Court permit the Attorney General of the State of Texas to proceed in the District Court for the 126th Judicial District of Texas, Travis County, Texas, in Causes No. 56252 and No. 56476 without stay, let or hindrance so that said causes may proceed to final judgment and that the State's claims for taxes, fines and penalties as prayed for in said suits be fixed and established in said state causes, and that all proceedings in this Court looking to the approval of the Debtor's proposed plan of reorganization be stayed pending the entry of said final judgments in said state causes, be and the same is hereby in all things overruled and denied. It is further Ordered that Causes No. 56252 and No. 56476, pending in the 126th Judicial District Court of Travis County, Texas, be and the same are hereby in all things stayed and the further prosecution of said causes be and the same is hereby enjoined and restrained.

It is further Ordered that all persons, their attorneys, agents and servants, be and they are hereby, jointly and

severally, restrained and enjoined from continuing the prosecution of any pending suit and from filing and prosecuting any suit or suits or any cause of action upon any debt, claim or demand against the Debtor in any Court or tribunal other than the Court in which this petition for reorganization is pending, and that the injunction herein ordered be cumulative of and in addition to the injunction contained in the order of the Court dated the 18th day of December, 1935.

It is further Ordered that all creditors and claimants of [fol. 72] the Debtor shall file with the Trustee, within ten days from the date of this order, evidence of their claim, debt or demand, which claim shall state the amount of the debt or claim, the name and address of the creditor or claimant, the security, if any, claimed, to which shall be attached a copy of any contract or instrument evidencing such security, all duly verified, and that after the expiration of said ten-day period, no creditor or claimant shall participate in this proceeding except on order for good cause shown; but said ten-day period shall not apply to any claim asserted by the State of Texas to certain crude oil, or to the proceeds of the sale thereof, this day ordered to be sold by the Trustee.

It is further Ordered that the Honorable Glenn Smith, one of the Referees in Bankruptcy of this Court, be and he is hereby appointed Special Master to hear and determine the amount and validity of all of the claims, debts and demands asserted by creditors or other claimants herein, to determine the liens and priorities to which the same are entitled and to classify the same with respect to the plan of reorganization filed herein by the Debtor; and the said Special Master is hereby authorized and directed to hear evidence and argument of counsel upon said matters at such places and at such times as he may determine, with due respect to the convenience of the claimants and other parties at interest, and as the Court may from time to time direct, and that said Special Master shall promptly make and file his report with respect to said matters.

Dated at Fort Worth, Texas, this the 15th day of January, A. D. 1936.

(Signed) James C. Wilson, United States District Judge.

[fol. 73] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO CORRECT AND MODIFY JUDGMENT

Now comes the State of Texas, by and through William McCraw, Attorney General of Texas, and respectfully moves this Honorable Court to correct and modify its judgment and order and decree entered in this cause of date January 15, 1936, by this Honorable Court in the following particulars:

That said judgment provides on page two thereof and on page three thereof as follows, to-wit:

"Thereupon came on to be heard the motion of the State of Texas, by and through William McCraw, its Attorney General, to rescind so much of the order of this Court entered on the 18th day of December, 1935, wherein it is ordered that the receivers appointed by the District Court for the 126th Judicial District of Texas, the attorneys and all other persons are restrained from prosecuting suits or attempting to take possession of the property of the Debtor and asking that this Court permit the Attorney General of the State of Texas to proceed in the District Court for the 126th Judicial District of Texas, Travis County, Texas, in Causes No. 56252 and No. 56476 without stay, let or hindrance so that said causes may proceed to final judgment and that the State's claims for taxes, fines and penalties as prayed for in said suits be fixed and established in said state causes, and that all proceedings in this Court looking to the approval of the Debtor's proposed plan of re-[fol. 74] organization be stayed pending the entry of said final judgment in said state causes. The Court, having considered said motion and having heard the evidence and argument of counsel thereon, is of the opinion that said motion should be overruled and denied, and it is, therefore,

Ordered that the motion of the State of Texas, by and through William McCraw, its Attorney General, to rescind so much of the order of this Court entered on the 18th day of December, 1935, wherein it is ordered that the receivers appointed by the District Court for the 126th Judicial District of Texas, the attorneys and all other persons are restrained from prosecuting suits or attempting to take pos-

session of the property of the Debtor and asking that this Court permit the Attorney General of the State of Texas to proceed in the District Court for the 126th Judicial District of Texas, Travis County, Texas, in Causes Nos. 56252 and 56476 without stay, let or hindrance so that said causes may proceed to final judgment and that the State's claims for taxes, fines and penalties as prayed for in said suits be fixed and established in said state causes, and that all proceedings in this Court looking to the approval of the Debtor's proposed plan of reorganization be stayed pending the entry of said final judgments in said state causes, be and the same is hereby in all things overruled and denied. It is further ordered that Causes No. 56252 and No. 56476, pending in the 126th Judicial District Court of Travis County, Texas, be and the same are hereby in all things stayed and the further prosecution of said causes be and the same is hereby enjoined and restrained.

It is Further Ordered that all persons, their attorneys, agents and servants, be and they are hereby, jointly and severally, restrained and enjoined from continuing the prosecution of any pending suit and from filing and prose- [fol. 75] cuting any suit or suits or any cause of action upon any debt, claim or demand against the Debtor in any Court or tribunal other than the Court in which this petition for reorganization is pending, and that the injunction herein ordered be cumulative of and in addition to the injunction contained in the order of the Court dated the 18th day of December, 1935."

In this connection it is shown that in cause No. 56,252 in the 126th Judicial District Court, as is shown by the State's pleadings heretofore filed in this cause, the State of Texas asked penalties, jointly and severally, against V. E. Jackson, J. B. Sowell, T. W. Sowell, C. B. Sowell and Minor Pipe Line Company, together with the debtor in this cause, to-wit, Trinity Refining Company, a corporation; that none of the other defendants in said cause No. 56,252 are corporations; that the cause of action of the State of Texas in said cause is severable; that none of the other defendants, save and except Trinity Refining Company, a corporation, are parties to this cause of action, and cannot be parties to this cause of action; that the State of Texas cannot collect any such penalties that may have accrued against V. E. Jackson, J. B. Sowell, T. W. Sowell, C. B. Sowell and Minor

Pipe Line Company in cause No. 1939 in Proceedings for Corporate Reorganization; that the State of Texas can and will proceed against the defendants in cause No. 56,252 in the said State Court other than Trinity Refining Company to collect such penalties and fines as may be due the State by virtue of their several and joint infractions of the conservation laws of the State of Texas; that the State of Texas can dismiss the Trinity Refining Company and any cause of action the State of Texas has against the said Trinity Refining Company in the State Court from the proceeding known as cause No. 56,252 and file its claim for any such penalties and fines and interest in the instant cause, and proceed against the other defendants in said [fol. 76] cause; that the judgment in this cause as entered by this Honorable Court enjoins the prosecution of said cause of action and restrains the State of Texas from proceeding with its cause of action against the parties other than the Trinity Refining Company, debtor in this cause. That it is manifestly in error for this Honorable Court to enjoin the prosecution of the State's claim against other parties in cause No. 56,252 who are not parties to this cause of action, and if said order is not correct or modified the State is prohibited from pursuing its statutory remedy to collect fines and penalties for infractions of the conservation laws of the state against V. E. Jackson, J. B. Sowell, T. W. Sowell, C. B. Sowell and Minor Pipe Line Company, none of whom are parties to this cause.

Wherefore, it is respectfully prayed that the order of this Honorable Court be modified so as to permit the State of Texas to proceed with its cause of action in cause No. 56,252 in the 126th Judicial District Court against all parties defendant, if it so desires, other than the Trinity Refining Company, debtor in this cause; and that the State of Texas be permitted, if it so desires, to present its claim to this Honorable Court for any fines, penalties and interest that may be due the State of Texas by virtue of violations of the conservation laws of the State of Texas by Trinity Refining Company, debtor in this cause; and for such other and further relief as may be mete and proper by virtue of the premises.

William McCraw, Attorney General of Texas; W. J. (Dick) Holt, Assistant Attorney General, Attorneys for State of Texas.

[fol. 77] (Copy)

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

No. 1939

In the Matter of TRINITY REFINING COMPANY, a Corporation, Debtor

On this 22nd day of January, A. D. 1936, came on to be considered a motion of the State of Texas to modify the order entered by this Court in this cause on the 15th day of January, A. D. 1936, to permit the State of Texas, if it desired, to proceed with the prosecution of its cause of action in Cause No. 56,252, in the 126th Judicial District Court of Travis County, Texas, against the defendants, or any part of them, in said cause, other than the Trinity Refining Company, a corporation, debtor in this cause, and came the State of Texas, appearing through one of its Assistant Attorney Generals, and the debtor, appearing through W. B. Harrell, one of its counsel, and announced ready for trial, and the Court having heard the motion, the facts and argument of counsel is of the opinion that the Court's order of January 15, 1936, should be modified to permit the State of Texas to proceed with its cause of action in suit No. 56,252, styled State of Texas vs. V. E. Jackson, et al., in the 126th District Court of Travis County, Texas, against the defendants in said suit, save and except the Trinity Refining Company, debtor herein.

It is, Therefore, Ordered, Adjudged and Decreed that the application of the State of Texas to modify said judgment be and the same is hereby granted as hereinafter provided.

It is Further Ordered that the State of Texas, plaintiff in the above styled and numbered cause, be and it is hereby [fol. 78] granted leave to sever said cause in the 126th District Court and to prosecute the same to final judgment against all defendants, or any part of them, in said cause, other than Trinity Refining Company, a corporation, debtor herein.

It is Further Ordered that the order of this Court of January 15, 1936, insofar as the same pertains to said cause as it affects Trinity Refining Company, a corporation,

debtor herein, be and the same is hereby continued in full force and effect.

It is Further Ordered, Adjudged and Decreed that the jurisdiction of the cause of action in said State Court, insofar as the same affects the Trinity Refining Company, debtor herein, shall remain in this Court.

——, United States District Judge.

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION FOR ORDER DISSOLVING INJUNCTIONS, ETC.

To the Honorable United States District Judge:

Now come the State of Texas, by and through William McCraw, its duly qualified and acting Attorney General, and J. C. Clopton and Bullock Hyder, Receivers, duly appointed and qualified and acting under and by virtue of the provisions of a certain order entered by the District [fol. 79] Court in and for the 126th Judicial District, Travis County, Texas, in certain suits there pending, wherein Debtor, among others, is a defendant in certain suits brought by and on behalf of the State of Texas against Debtor and others to recover taxes, fines and penalties for the production, sale or transportation of crude petroleum oil in violation of the conservation laws of the State of Texas, and certain laws providing for the collection of taxes upon the sale of crude petroleum oil products in said State, the amount of said taxes being more fully hereinafter set out; and respectfully represent and show to the Court as follows:

I

That heretofore, on the 12th day of October, 1935, the State of Texas, by and through William McCraw, the duly elected, qualified and acting Attorney General of the State of Texas, entered suit in the District Court in and for the 126th Judicial District, Travis County, Texas, seeking the enforcement and collection of certain fines, penalties and interest incurred by the Debtor and its stockholders, manager and agents as a result of numerous violations of the

conservation laws of the State of Texas. That the State of Texas, in seeking the enforcement and collection of such fines, penalties and interest, also asserted and is still asserting a statutory lien upon all of the property and estates of the Debtor and the foreclosure of such lien to secure the payment of said penalties in such State. It is prayed that the sum of $791,000.00 in fines, penalties, and interest be recovered of and from the Trinity Refining Company, Debtor, and J. B. Sowell, T. W. Sowell, C. B. Sowell, and V. E. Jackson, doing business as the Lone Star Refining Company; and that the statutory lien as provided for in Article 7065a, Section 7 R. C. S. of the State of Texas (Acts of 1933, 43rd Legislature, Page 75, Chapter 44, Section 7) [fol. 80] be foreclosed, and further that a Receiver be appointed to take over, hold and operate said property for the purpose of foreclosing such lien securing the payment of the alleged fines, penalties and interest. A copy of the State of Texas petition and trial amendment filed in said cause is attached hereto, marked "Exhibit A", and made a part thereof for all pertinent purposes.

That in response to the prayer of said State of Texas' petition, notice was duly served upon the Trinity Refining Company and the other named defendants, notifying said parties to come in on the — day of ——, A. D. 1935, and show cause why a receiver should not be appointed as prayed for, and why injunction should not issue; and upon the day appointed for such hearing, the parties defendant in said suit came not, but appeared by counsel. Said counsel stated substantially to the Court that there had been filed in the United States District Court in and for the Western District of Texas a petition for the removal of said cause then pending in the 126th Judicial District Court of Travis County, Texas, by Trinity Refining Company, J. B. Sowell, T. W. Sowell and C. B. Sowell, Minor Pipe Line Company and V. E. Jackson. The petition for removal alleged substantially that enforcement of the statutes of the State of Texas provides for the imposition of penalties for the violation of the conservation laws of the State of Texas, which statute and enforcement thereof was denying to the Trinity Refining Company, J. B. Sowell, T. W. Sowell, C. B. Sowell, Minor Pipe Line Company, and V. E. Jackson equal civil rights under the Constitution of the United States; and was denying to them the equal pro-

tection of the law. That by reason of the filing of the petition for removal, the State Court had no jurisdiction to proceed further in the above named suits.

Counsel for the Trinity Refining Company and other named parties, after making the above appearance and [fol. 81] statement to the State Court, retired from the Courtroom. Thereupon the Attorney General announced ready for trial and advised the Court that in his opinion the petition for removal was not well founded in law, and as a consequence, the mere filing of the petition could not under the matters asserted in said removal petition operate as a hindrance to the State's authority in prosecuting the State of Texas' suit to establish the State's claim for penalties and the foreclosure of the lien, and the appointment of receivers by reason of the alleged violations in the petition filed in said cause. The District Court, after considering the matter, directed the State's attorney to proceed with the hearing. In the course of said hearing the testimony of a number of the witnesses was received by the Court, establishing the facts as alleged in the State's petition to the effect that numerous violations had been committed by Trinity Refining Company, Debtor, and the other named parties against the conservation laws of the State of Texas. At the conclusion of the hearing of evidence and argument of counsel, the Court announced substantially that it was one of the most flagrant cases presented to him showing violations of the conservation laws of the State of Texas, and that the case made by the State of Texas amply warranted the appointment of the receivers to take charge of the properties of Trinity Refining Company, Debtor.

The Court accordingly on the 25th day of October, 1935, entered its order appointing J. C. Clopton and Bullock Hyder, Receivers, to take over all the properties, assets and estates of the Trinity Refining Company and of the other parties named. A copy of said order appointing said receivers is attached hereto, marked "Exhibit B" and made a part hereof for all pertinent purposes.

[fol. 82] Subsequent to the appointing of the Receivers by the State Court, the defendants in said cause procured the issuance of a notice out of the United States District Court in and for the Western District of Texas, sitting at San Antonio, notifying the Attorney General and other State

Officers to appear in the said Court on the — day of ——, 1935, and show cause why an injunction should not issue, restraining enforcement of the suit pending in the State Court. Upon the day set for the hearing on the show cause order, the State answered by filing a plea to the jurisdiction, asserting that the petitioners for removal were not afforded the privilege of removal under Section 74, U. S. C. A., and the Hon. R. C. McMillan, United States District Judge, after hearing both sides announced that in his opinion the position for removal was not well founded, and that unless counsel for the petitioners could at a subsequent date convince him to the contrary, he would enter an order remanding the cause to the State District Court. On the — day of ——, 1935, the petitioners for removal joined in a motion addressed to the United States District Judge, moving for remand of the cause attempting to be removed from the State Court. The Court, after considering the motion, entered its order remanding the cause to the State District Court, a copy of which petition for removal, a copy of the joint motion to remand, and a copy of the order remanding said cause are attached hereto and marked "Exhibit 'C', 'D', and 'E'," respectively.

That after the remand of said cause, said Receivers immediately qualified by giving a required bond and took charge of the properties and estates, and were in charge of said property and estates of the Trinity Refining Company, Debtor, and other named parties until summarily dispossessed by David Donoghue, Trustee, appointed by order of this Honorable Court.

[fol. 83] II

That on December 14, 1935, the State of Texas filed a suit by verified petition in the District Court for the 98th Judicial District of Travis County, Texas, in Cause No. 56,472, against Trinity Refining Company, Debtor, V. E. Jackson, J. B. Sowell, C. B. Sowell and Minor Pipe Line Company, pursuant to the provisions of H. B. 247, passed by the 43rd Legislature of the State of Texas, as amended by H. B. 749, Acts of the 44th Legislature of the State of Texas, seeking the recovery of certain taxes, penalties and interests by reason of the operations of the properties of Trinity Refining Company, Debtor, and the other named parties, in the amount of $104,084.47. Said taxes were in-

curred by reason of the activities of said parties in refining, manufacturing, producing, blending, and compounding motor fuel and by making the first sale, distribution and use of the motor fuel within the State of Texas, and by reason of the activities of such parties, a tax of four cents per gallon of gasoline sold by said parties was incurred. The State in that suit was also seeking the foreclosure of the lien, which by the statutory law of the State is made a first and prior lien to any and all other existing lien upon the properties of any distributor of motor fuel, as defined by law. That upon the filing of said petition application was made to the District Court for the appointment of a receiver. The Judge of said Court however, declined at that time to appoint receivers to take charge of the properties and estates of the Trinity Refining Company, Debtor, and other named parties, for the reason that the receivers appointed by the District Court for the 126th Judicial District Court, Travis County, Texas, were then in possession of the properties and estates as a result of the filing of the suit of the State of Texas against Trinity Refining Company, a corporation, V. E. Jackson, J. B. Sowell, T. W. Sowell, C. B. Sowell, and Minor Pipe Line Company in [fol. 84] the District Court of the 126th Judicial District of Travis County, Texas.

That on the 8th day of January, 1936, it appearing to the Judge of the District Court for the 126th Judicial District, Travis County, Texas, upon motion that there was on file in said Court Cause No. 56,476, wherein the State of Texas was plaintiff, V. E. Jackson, Trinity Refining Company, J. B. Sowell, T. W. Sowell, C. B. Sowell, and Minor Pipe Line Company were defendants, same being the suit originally filed in the District Court of the 98th Judicial District, Travis County, Texas, wherein the State of Texas was seeking recovery of taxes, penalties, and interest against Trinity Refining Company, Debtor, and other named parties; and the Court after considering the motion of the State of Texas, entered an order appointing J. C. Clopton and Bullock Hyder Receivers of the properties and estates of Trinity Refining Company and other named parties as originally appointed in Cause No. 56,476, and further adjudged and decreed that no additional bond should be given by said Receivers, and that the bond originally given by them in Cause No.

56,252, should be adequate. A copy of said order is attached hereto, marked "Exhibit F" and referred to and made a part hereof for all pertinent purposes. That by reason of the above proceedings in the District Court of the 126th Judicial District of Travis County, Texas, and by reason of the filing of the suit by the State of Texas for the collection of taxes, fines, penalties and interests against Trinity Refining Company, V. E. Jackson, J. B. Sowell, T. W. Sowell, C. B. Sowell, and Minot Pipe Line Company, and the asserting of a statutory lien, and the prayer for foreclosure thereof upon the properties and estates of said Debtor and other named parties, and the subsequent appointing of Receivers and taking over of the properties [fol. 85] and estates by the Receivers so appointed, the properties and estates of the Debtor are now in the exclusive jurisdiction of the Court of the State of Texas, and the existence of a valid statutory lien, and the prayer for foreclosure thereof, deprives this Honorable Court of jurisdiction to enter any order summarily or otherwise compelling the State Court Receivers to turn said properties and estates of the Debtor in the Receivers' possession over to David Donaghue, Trustee, appointed by this Court.

III

It is further shown to the Court that in Cause No. 56,476 and Cause No. 56,252, styled State of Texas vs. V. E. Jackson, Trinity Refining Company, and others in the District Court, 126th Judicial District, Travis County, Texas, there was filed on the 18th day of February, A. D. 1936, a motion by Bullock Hyder and J. C. Clopton, Receivers in said causes, whereby said Receivers moved the Judge of said Court to enter an order authorizing them to institute appropriate proceedings in this Court in the matter of Trinity Refining Company, a corporation, Debtor, No. 1939, in proceedings for corporate reorganization, with a view of reobtaining possession by said Receivers of the properties and estates of the Trinity Refining Company, originally held by them, pursuant to the orders of the District Court as above set out, and which properties and estates were summarily taken over from them by David Donoghue, Trustee, appointed by this Honorable Court in No. 1939, in proceeding for corporate reorganization of Trinity Refining Company. Receivers also moved the State Court

to enter an order authorizing them to institute appropriate proceedings in this Court looking to the dissolution of an injunction issuing out of this Court and directed against said Receivers, from interfering with David Donoghue, Trustee, appointed by this Court, in the possession by him [fol. 86] of the properties and estates of Trinity Refining Company, a corporation, Debtor.

That on the 18th day of February, 1936, the Hon. W. F. Robertson, Judge of the 126th Judicial District Court, Travis County, Texas, in said cause, entered his order directing Bullock Hyder and J. C. Clopton, Receivers in said causes, to institute appropriate proceedings in this Court looking to the return of the properties and estates of the Trinity Refining Company to them by this Honorable Court, and also looking to the dissolution of the injunction issuing out of this Court directed against them from interfering with David Donoghue, Trustee; a copy of said motion and a copy of said order are attached hereto and marked "Exhibit 'G' and 'H'" and made a part hereof for all pertinent purposes.

IV

Pursuant to the above order, J. C. Clopton and Bullock Hyder, Receivers, here and now respectfully move this Honorable Court to enter its order dissolving the injunction heretofore directed against them from interfering with David Donoghue, Trustee, appointed by this Court; and further to enter an order directing David Donoghue, Trustee, as aforesaid, to turn over to these Receivers the properties and estates of the Trinity Refining Company to them, said properties and estate being originally held by them under orders of the District Court, 126th Judicial District, Travis County, Texas, for the following reasons and grounds, to-wit:

These Receivers assigned first all of the facts and circumstances heretofore alleged in this motion respecting the bringing of the suits against Trinity Refining Company and other named parties, and the entry of the orders by the State District Judge in said causes appointing them [fol. 87] as Receivers to take over, hold and preserve the properties and estates of the Trinity Refining Company pending the foreclosure of the statutory liens asserted in said causes of action.

These Receivers would further show that the suits brought on behalf of the State of Texas by and through its Attorney General were not suits brought looking to the establishment of an "Equity Receivership" as contemplated under (Section 77-B (i), U. S. C. A., Title 11, Section 207 (i) Amendatory to the Bankruptcy Act of 1898) but on the contrary, the suits in the State Courts being for the recovery of taxes, fines and penalties and the foreclosure of the statutory liens in favor of the State of Texas, securing the payment of said taxes, fines and penalties due the State of Texas.

In further support of Receivers motion for a dissolution of injunction, and a return of the properties and estates of the Debtor to them, these Receivers would show that this Court was without authority of law to enter the injunction against them, or to enter the order whereby the properties and estates of the Trinity Refining Company, Debtor, were summarily taken from them by David Donaghue, Trustee, in that in the petition for reorganization filed in this cause by Trinity Refining Company, Debtor, it is alleged in paragraph six thereof that:

"The Debtor is not insolvent but is unable to meet its debts as they mature, and desires to effect a plan of reorganization as provided in Section 77-B of the Act of Congress amendatory to the Bankruptcy Act of 1898 (Sec. 207, Title 11, U. S. C. A.)"

In addition to the above it is alleged in said petition for reorganization under paragraph 8 that:

"The Debtor would show that its debts as set out in paragraph four of this petition are now due and past due, [fol. 88] and as shown by said paragraph four it does not now have funds on hand sufficient to discharge such indebtedness. The Debtor respectfully shows to the Court that in the State Receivership proceeding, hereinbefore mentioned, no plan for the reorganization of the Debtor has been proposed, and none is contemplated, nor has any effort been made in such receivership to discharge the debts and obligations of the Debtor, nor has any method been devised or proposed for such purpose,"

That in addition to the above it is recognized by Debtor under paragraph eight of said petition that the State of

Texas has and is asserting a lien to secure the payment of the gasoline taxes.

V.

Accordingly it is shown that the issuance of the injunction by this Court against Receivers and the summary order issued out of this Court directing David Donoghue, Trustee, to take over the properties and estates of Trinity Refining Company, one of the defendants in the causes above set out, and in which the foreclosure of the statutory liens securing the payment of such taxes, fines and penalties is prayed for, this Honorable Court was not authorized to enter any injunction or enter any summary order directed against these Receivers, under Section 77-B of the Bankruptcy Act of 1898, as amended.

Wherefore it is prayed that this Honorable Court entertain this motion and enter its order dissolving the injunctions heretofore issued against these Receivers from interfering with the possession by David Donoghue, Trustee, appointed by this Court and to enter its order directing said David Donoghue, Trustee, to turn over to these Re-
[fol. 89] ceivers the properties and estates of the Trinity Refining Company, Debtor.

William McCraw, Attorney General of Texas. W. J. (Dick) Holt, William C. Davis, C. M. Kennedy, Joe Sharp, Assistants Attorney General. Ben Greenwood, Attorney for J. C. Clopton and Bullock Hyder, Receivers.

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION OF DEBTOR TO DISMISS MOTION OF THE STATE OF TEXAS AND OF J. C. CLOPTON AND BULLOCK HYDER, RECEIVERS, FOR AN ORDER DISSOLVING THE INJUNCTION HERETOFORE ISSUED, ETC.

To the Hon. James C. Wilson, Judge of said Court:

Comes now Trinity Refining Company, a corporation, Debtor in the above entitled and numbered cause, and files

[fol. 90] this, its motion to dismiss the motion of the State of Texas and of J. C. Clopton and Bullock Hyder, Receivers, for an order of the Court dissolving the injunction heretofore issued against the Receivers, and for an order directing David Donoguhe, Trustee, to turn over to said Receivers the properties and estates of Trinity Refining Company, and respectfully shows to the Court:

1

That heretofore on the 13th day of January, 1936, the State of Texas, by and through its Attorney-General, William McCraw, and J. C. Clopton and Bullock Hyder, Receivers in Cause No. 56252 in the 126th Judicial District Court of Travis County, Texas, filed their motion to dismiss the petition for corporate reorganization of the Debtor, and for an order directing David Donoghue, Trustee herein, to deliver the properties and estates of the Debtor into the hands of J. C. Clopton and Bullock Hyder, Receivers in the State Court, and on said 13th day of January, 1936, such motion was heard by this Honorable Court, and in said motion and at said hearing the State of Texas and the Receivers presented and urged to the Court the same matters and things as they now urge in their motion for an order dissolving the injunction against the Receivers and for an order directing the Trustee to turn over the properties and estates of the Debtor to said Receivers; and on the 13th day of January, 1936, the Court, after such hearing, in all things overruled and denied the motion of the State and of said Receivers. That the order of the Court on January 13th, 1936, overruling and denying such motion, from which neither the State nor said Receivers have appealed, is an effective bar against the State and said Receivers further urging the matters and things therein disposed of and the present motion, and said State and said Receivers are not now entitled to have their present motion [fol. 91] considered by the Court, but that such motion should be by the Court in all things dismissed.

2

The said J. C. Clopton and Bullock Hyder, who are styled as Receivers appointed in the State Court, as set out in paragraph 1 hereof, are wholly without authority to have the custody of the properties and estates of the Debtor, and

are not entitled to be heard to say in this Honorable Court that they are Receivers of the properties of the Debtor, because it affirmatively appears from the pleadings of the State in said suit and the order of the Court purporting to appoint said Clopton and Hyder as Receivers therein that their appointment is void, for that the State of Texas was not a creditor of the Debtor, nor were the properties of the Debtor a fund out of which the State's alleged debt was entitled to be paid.

Wherefore, the Debtor prays that said motion be in all things dismissed.

——— ———, ——— ———, Attorneys for the Debtor.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

No. 1939

In the Matter of TRINITY REFINING COMPANY, a Corporation, Debtor

In Proceedings for Corporate Reorganization

On the 30th day of March, 1936, came on to be heard the motion of the State of Texas, through its Attorney Gen- [fol. 92] eral, and J. C. Clopton and Bullock Hyder, Receivers, asking the Court to entertain their said motion and enter its order dissolving the injunctions heretofore issued out of this Court against said Receivers from interfering with the possession of David Donoghue, Trustee herein, and to direct said David Donoghue, Trustee, to turn over to said Receivers the properties and estates of Trinity Refining Company, Debtor. And at the same time, the Debtor presented its motion to dismiss said motion of the State of Texas and said J. C. Clopton and Bullock Hyder, Receivers, for the reason that said State of Texas and said Receivers had heretofore filed in this Court a motion covering the same matters and things contained in the motion now before the Court, and said State of Texas and said Receivers had on the 14th day of January, 1936, presented said motion to the Court, with their evidence and argument thereon, and that the Court did by order dated the 15th day of January, 1936, overrule and deny said motion, and said

Debtor prayed that said motion of the State of Texas and said Receivers be in all things dismissed; and having heard the evidence and argument on said motion of the Debtor to dismiss, the Court finds that the same matters and things presented in the motion of the State of Texas and said Receivers presented on March 30th, 1936, and now before the Court, were presented to the Court by said State of Texas and said Receivers and were heard by the Court on January 14th, 1936, and were by order of the Court dated the 15th day of January, 1936, overruled and denied; and the Court further finds that the motion of the State of Texas and said Receivers presented on the 30th day of March, 1936, and now before the Court, presents no matter other than was presented by the State of Texas and said Receivers on the 14th day of January, 1936, and heard and disposed of by order of the Court dated the 15th day of January, 1936, and that Debtor's motion to dismiss should be granted.

[fol. 93] It is, Therefore, Ordered, Adjudged and Decreed that the motion of the Debtor to dismiss the motion of the State of Texas and of J. C. Clopton and Bullock Hyder, Receivers, wherein the State of Texas and J. C. Clopton and Bullock Hyder, Receivers, request an order dissolving the injunction heretofore issued out of this Court against the Receivers from interfering with the possession of David Donoghue, Trustee herein, and request an order directing David Donoghue, Trustee, to turn over to said Receivers the properties and estates of Trinity Refining Company, Debtor herein, be and the same is hereby in all things granted.

It is Further Ordered that the motion of the State of Texas and of J. C. Clopton and Bullock Hyder, Receivers, wherein the State of Texas and J. C. Clopton and Bullock Hyder, Receivers, request an order dissolving the injunction heretofore issued out of this Court against the Receivers from interfering with the possession of David Donoghue, Trustee herein, and request an order directing David Donoghue, Trustee, to turn over to said Receivers the properties and estates of Trinity Refining Company, Debtor herein, be and the same is hereby in all things dismissed.

To all of which action of the Court, the State of Texas and J. C. Clopton and Bullock Hyder, Receivers, then and there in open Court duly excepted and then and there in

open Court gave notice of appeal to the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans.

Dated and entered this the — day of May, 1936.

——— ———, United States District Judge.

———

[fol. 94] IN UNITED STATES DISTRICT COURT

[Title omitted]

ANSWER TO THE MOTION OF THE STATE OF TEXAS AND OF J. C. CLOPTON AND BULLOCK HYDER, RECEIVERS, FOR AN ORDER DISSOLVING THE INJUNCTION HERETOFORE ISSUED AGAINST THE RECEIVERS, ETC.

To the Hon. James C. Wilson, Judge of said Court:

Comes now Trinity Refining Company, a corporation, Debtor in the above entitled and numbered cause, and in answer to the motion of the State of Texas and of J. C. Clopton and Bullock Hyder, Receivers, for an order dissolving the injunction heretofore issued against the Receivers from interfering with the possession of David Donoghue, Trustee, and for an order directing David Donoghue, Trustee, to turn over to said Receivers the properties and estates of Trinity Refining Company, Debtor, respectfully shows to the Court:

1

It affirmatively appears from the face of the aforesaid motion that at the time of the institution of this proceed-[fol. 95] ings for corporate reorganization there was pending against the Debtor, and others in the District Court of Travis County, in the 126th Judicial District of Texas, an equity receivership.

2

That on the 18th day of December, 1935, at the time of the institution by the Debtor of this proceedings for corporate reorganization, and at the time of the appointment of the Trustee herein, none of the properties of the Debtor were in the custody of any other Court or the receiver or officer of any other Court in any proceeding ancillary or incidental to the enforcement by the State of Texas or any other person of any valid specific lien.

3

The Debtor would show that it affirmatively appears from the pleadings in the case pending in the 126th Judicial District Court of Travis County, Texas, in which case J. C. Clopton and Bullock Hyder were acting as Receivers of the properties of the Debtor on the said 18th day of December, 1935, that the claim asserted therein by the State of Texas against the Debtor, and the other defendants in said suit, was for an unliquidated demand, which upon hearing might and could have been determined to have been nothing or one dollar or any number of dollars up to and including $791,000.00, the amount sued for, and that at the time of the institution of this proceedings for corporate reorganization and at the time of the appointment of the Trustee and at the time of the taking over by said Trustee of the properties of the Debtor, there had been no finding or determination in said State Court of any sum whatsoever which the Debtor owed the State of Texas.

[fol. 96] The Debtor further alleges that it affirmatively appears from the State's petition in said state case that the receivership was applied for by the State in said state case solely to wrest out of the hands of the defendants in said state case the means of violating the conservation laws of the State of Texas and to prevent violations by the defendants of such laws and as a punishment for alleged prior violation of the conservation laws; and that it affirmatively appears from the face of the State's pleadings in said state case that the State was not in such case asserting against the properties of the Debtor any valid specific lien.

4

It affirmatively appears from the face of the State's motion that the Receivers appointed by the State Court were appointed within less than four months from the date of the institution of this proceedings for corporate reorganization.

5

The said J. C. Clopton and Bullock Hyder, who are styled as Receivers appointed in the State Court, as set out in paragraph 3 hereof, are wholly without authority to have the custody of the properties and estates of the Debtor, and are not entitled to be heard here to say in this Honorable Court that they are Receivers of the properties of the

Debtor, because it affirmatively appears from the pleadings of the State in said suit and the order of the Court purporting to appoint said Clopton and Hyder as Receivers therein that their appointment is void, for that the State of Texas was not a creditor of the Debtor, nor were the properties of the Debtor a fund out of which the State's alleged debt was entitled to be paid.

[fol. 97] 6

The Debtor denies that this Honorable Court was without jurisdiction to entertain its petition for corporate reorganization at the time the same was filed or to appoint the Trustee, but the Debtor says on the other hand that under the provisions of Section 77-b of the Bankruptcy Act of 1898 as amended, this Court had full power and authority to and rightfully did entertain its petition for corporate reorganization, permit the same to be filed, and appointed the Trustee herein.

Wherefore, the Debtor prays that the motion of the State of Texas and of the Receivers, J. C. Clopton and Bullock Hyder, be in all things denied and that this corporate reorganization proceeding go forward as provided by law.

——— ———, ——— ———, Attorneys for the Debtor.

IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS RESTRAINING ORDERS, ETC.

To the Honorable James C. Wilson, Judge of said Court:

Now comes the State of Texas, acting by and through William McCraw, the duly elected, qualified and acting Attorney General of the State of Texas, and respectfully moves the Court to dismiss its restraining orders in injunctive proceedings issued against the State of Texas and [fol. 98] its officers and administrative agencies in this Court for the following good and sufficient reasons:

I

That the injunction whereby this Court has restrained the State of Texas, acting through its duly constituted

officers, from prosecuting certain suits in the Courts of the State of Texas, seeking the recovery of taxes, fines and penalties, and seeking the recovery of penalties from the Debtor herein and others for violations by them of the conservation laws of the State of Texas is in truth and in fact and is essentially a suit against the State of Texas, inhibited by the Eleventh Amendment to the Constitution of the United States.

Wherefore, the State of Texas, through its Attorney General, prays that all the injunctive processes issuing out of this Court, restraining the officers of the State of Texas from prosecuting said suit, be in all things set aside and dissolved.

William McCraw, Attorney General of Texas. William C. Davis, C. M. Kennedy, W. J. (Dick) Holt, (Joe Sharp,) Assistants Attorney General.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION.

No. 1939

In the Matter of TRINITY REFINING COMPANY, a Corporation, Debtor

In Proceedings for Corporate Reorganization

On the 30th day of March, 1936, came on for hearing the motion of the State of Texas, acting by and through Wil- [fol. 99] liam McCraw, its Attorney General, praying that all of the injunctive processes issuing out of this Court restraining the officers of the State of Texas from prosecuting certain suits in the Courts of the State of Texas seeking the recovery of taxes, fines and penalties and seeking the recovery of penalties from the Debtor herein and others, be in all things set aside and dissolved; and after hearing said motion and the evidence and arguments thereon, the Court finds that the same should be granted.

It Is, Therefore, Ordered, Adjudged And Decreed that all injunctions, heretofore issued in this cause against the State of Texas and its officers and administrative agencies, restraining and enjoining them from prosecuting causes No. 56252 pending in the 126th Judicial District Court of

Travis County, Texas, styled The State of Texas vs. V. E. Jackson, et al., and being a suit seeking the recovery of statutory penalties for alleged violations of the conservation laws of the State of Texas, and restraining the State of Texas, its officers and administrative agencies, from prosecuting cause No. 56476 pending in the 126th Judicial District Court of Travis County, Texas, styled The State of Texas vs. V. E. Jackson, et al., seeking the recovery of taxes, fines and penalties, be and the same are hereby in all things set aside and dissolved,

Dated and entered this the — day of May, 1936.

— ——, United States District Judge.

[fol. 100] IN UNITED STATES DISTRICT COURT

[Title omitted]

AMENDED MOTION OF THE STATE OF TEXAS FOR PERMISSION TO PROCEED IN CONFISCATION PROCEEDINGS AGAINST 69,900 BARRELS OF OIL, NOW IN POSSESSION OF DAVID DONOGHUE, TRUSTEE

To the Honorable James C. Wilson, Judge of said Court:

Now comes the State of Texas, acting by and through William McCraw, the duly elected, qualified and acting Attorney General of the State of Texas, and without waiving any of the pleas to the jurisdiction heretofore filed in this cause, and after obtaining leave, files this amended motion, and would show to the Court as follows, to-wit:

I

That heretofore on the 13th day of February, A. D. 1936, this Honorable Court on the motion of David Donoghue, Trustee of the Trinity Refining Company, a corporation, ordered sold the hereinafter described oil, and ordered the proceeds thereof to be held pending the determination of the claims of the various parties, including the State of Texas. The particular oil concerning which said order was entered is described as follows, to-wit:

Being 69,000 barrels more or less of weathered and/or topped crude of a gravity of approximately 24 gravity, and

[fol. 101] being situated in what is known as the Farris earthen pit in the Augustine Survey in Upshur County, Texas.

It is further shown that it appears from the petition for corporate reorganization of Trinity Refining Company, debtor in this cause, and from the books and records in the custody of the agents of the Railroad Commission of Texas that Trinity Refining Company, debtor, now has on hand, and to which it claims title in this proceeding, approximately 40,000 barrels of fuel oil, located and described as consisting of:

Approximately 5,000 barrels, more or less, in steel storage tank No. 5 on the Phillips lease, Block 77, M. Dillard Survey, Gregg County, Texas; and

Approximately 10,000 barrels of fuel oil, more or less, in Tank No. 10, on the Callum lease in the Rhodes Survey, Gregg County, Texas; and

Approximately 25,000 barrels of oil in Tank No. 25, on the Callum lease, Rhodes Survey, Gregg County, Texas.

Also about 37,500 barrels of fuel oil located in Tank 37 on the Hanbury lease in the Hokit Survey in Gregg County, Texas.

That said crude petroleum oil and crude petroleum products above described are illegal and unlawful oil as defined by the statutes of the State of Texas and the rules and regulations of the Railroad Commission of Texas, as will more fully hereinafter appear.

II

That House Bill 581, Acts of the 44th Legislature of the State of Texas, effective May 11, 1935, provides that all [fol. 102] unlawful oil and unlawful products of oil as defined by said bill are thereby declared to be a nuisance and shall be forfeited to the State of Texas as therein provided. Said Bill further provides that the Attorney General, when advised from any source of the presence and existence of unlawful oil and/or unlawful products of oil, shall immediately institute a suit in rem against such unlawful oil and/or unlawful products of oil and against all persons owning, claiming or in possession thereof, such suit to be brought in the name of the State of Texas in any Court of competent jurisdiction in Travis County, Texas, or in the county in which such oil or product is

located. That said Act defines unlawful oil to be and to include oil which has been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the Commission and oil which has been produced within said State in violation of any law of said State or in violation of any order of the Commission, and shall include any oil transported in violation of any such law or in violation of any such order.

III

That said Act defines unlawful product to be any product derived from refined crude oil, any part of which was processed or derived in whole or in part from unlawful oil or from any product of unlawful oil, or from unlawful gas, or which is transported in violation of any order of the Commission or in violation of the laws of the State of Texas.

IV

That at all times since September 29, 1932, the Railroad Commission of the State of Texas has had in force and effect pursuant to authority vested in it by the Legislature of the State of Texas, valid orders regulating and pro- [fol. 103] rating the allowable production of crude petroleum oil for each and every well in the East Texas field located in the counties of Rusk, Gregg, Upshur, Smith and Cherokee. That at all times since August 12, 1931, the statutes of Texas have prohibited the purchasing, transportation or handling of crude petroleum oil produced in whole or in part in excess of the amount allowed by statute or by any rule, regulation or order of the Railroad Commission of Texas. That at all times since September 29, 1932, the Railroad Commission of Texas has had in force valid rules, regulations and orders to make more effective such statutes, including requirement for securing approved tenders or certificates of clearance or other paper before transporting crude petroleum oil. That at all times since April 13, 1935, the statutes of Texas prohibited the transportation or handling in any other way of any product of crude petroleum oil, as such product was defined by law, in violation of any oil or gas conservation statute of this State or of any rule, regulation or order of the Railroad Commission of Texas promulgated thereunder.

V

That under the laws of the State of Texas and particularly Title 102 of the Revised Civil Statutes of Texas, 1925, and all amendments thereto, the Railroad Commission of Texas is charged with the duty of issuing, promulgating and enforcing orders, rules and regulations to prevent the waste of crude petroleum within the State of Texas. That waste of such natural resource is defined by said law and is prohibited. That under said law said Railroad Commission of Texas is authorized to fix and establish from time to time the quantity of oil which may be lawfully produced by any person owning a well producing crude oil and/or natural gas within the State of Texas. Pursuant to such [fol. 104] authority and after due notice and hearing in the manner prescribed by said laws, the Railroad Commission of Texas have from time to time by various orders, rules and regulations entered on its oil and gas dockets fixing the amount of oil which each such well from time to time is permitted to produce. That oil produced in accordance with and in obedience to such laws, rules, regulations and orders of the Railroad Commission of Texas is generally known as "allowable oil" and oil produced from any well in excess of such allowable oil is commonly known as "excess oil" or "hot oil" or "unlawful oil".

VI

That each such order and rule and regulation promulgated by the Railroad Commission of Texas, and the amount of allowable production fixed for each well has been made known to the operator of each such well, and the operator of every well is charged with knowledge of all such orders, rules and regulations and allowables for his well as fixed from time to time. That pursuant to said authority the Railroad Commission of Texas has published an allowable schedule from time to time containing the allowables fixed from time to time for all of the wells in the East Texas Field, including the wells owned by the defendants hereinafter more fully described, a copy of which allowable schedule is kept in the Railroad Commission office at Kilgore, Texas, where all of the Commission's books, records and administrative affairs as they pertain to said East Texas Field are kept. That such allowable schedule and

all other such books and records are kept open to the public, and they are placed at the disposal of each of the owners of oil wells and operators in said field as a source of information to them of the amount of allowable oil as fixed by said rules and regulations. That all operators of oil wells in said field are charged with knowledge of the contents of said orders, and of said allowables, and of said [fol. 105] allowable schedule; and as to each of such orders and allowable schedules affecting the properties belonging to the debtor hereinafter fully described, said debtor and each of them had not only constructive knowledge hereinbefore set out but likewise actual knowledge thereof.

VII

That pursuant to Title 102 of the Revised Civil Statutes of the State of Texas, 1925, and amendments thereby by the Legislature of the State of Texas, the Railroad Commission of Texas by authority of law took the potential hourly producing capacity of each producing oil well in the field, known as the East Texas Field, by means of what is known as a contour map after actually making gauges of the producing capacity of key wells in said field. That the Railroad Commission published what is known as a proration schedule based upon the potential production survey of said field and filed in its office in Austin and in each district office in the State of Texas, and particularly the Kilgore office having supervision of the East Texas field, a proration schedule subject to view and inspection of any interested party and in addition thereto by mail did widely circulate the percentage allowed to be produced from each well in the East Texas field so that all parties could be and were advised of the rule, regulation and order of the Railroad Commission of Texas, permitting and allowing production of oil of each well in the East Texas Field. That the applicable rules, regulations and orders of the Railroad Commission, all of which are valid and subsisting, are as follows:

VIII

That the Attorney General of Texas has been advised that all of the above described oil and oil products is unlawful oil or that same is unlawful products of crude petro- [fol. 106] leum oil, in that said oil and products have been

transported in violation of the valid rules and regulations of the Railroad Commission, and were produced in violation of said rules and regulations in that the crude petroleum oil above described has been produced in excess of the allowable granted to each well, from which said oil was produced, and that all of the products above described have been transported without duly approved tenders from the Railroad Commission.

IX

It is shown that the Railroad Commission of Texas through orders duly promulgated and effective at all times herein mentioned, have set up a system of records, abstracting and accounting for all legal and allowable oil produced in the East Texas Oil Field, in its office at Kilgore, Texas. It is alleged that the oil in question was produced in the East Texas Oil Field, but that the wells from which the same was produced is unknown to the agents of the State of Texas and peculiarly within the knowledge of the adverse parties to this litigation. That allowable oil produced in accordance with the rules, regulations and orders of the Railroad Commission, promulgated by virtue of the statutory laws of Texas, is identified by number and record in the office of the Railroad Commission of Texas at Kilgore, accounting for all oil produced in the East Texas Oil Field. That the oil hereinabove described was not produced in accordance with the orders of the Commission and the laws of the State of Texas, and no record of its production as allowable oil exists in the office of the Railroad Commission of Texas. That oil such as described in this motion is known as excess or unallowable, or unlawful oil; and that the oil hereinbefore described is excess, unallowable, and unlawful oil.

[fol. 107] X

The State of Texas here alleged that said oil was transported in violation of the rules and regulations of the Railroad Commission of Texas, prior to the time that it was placed in said pit where it is now located and prior to the time that the Trustee, David Donoghue, came into possession of said oil. That said oil was not produced in accordance with the valid rules and regulations of the Railroad Commission, but the Attorney General of the State of

Texas is advised that said oil was produced in excess of the valid rules and regulations of the Railroad Commission. That by virtue thereof, said oil is unlawful oil and unlawful products of oil.

XI

That by virtue of the premises, said oil is subject to confiscation by the State of Texas in an action brought by way of a suit in rem against the oil. That under the statutes of the State of Texas, the State could not proceed against the proceeds of said oil after same has been sold, but must proceed in accordance with House Bill 581, which provides that said suit shall be brought in rem against said oil. And that for the further reason that it is not within the competency of the Courts of the United States, sitting in bankruptcy to entertain a proceeding in the nature of a suit on behalf of the State of Texas seeking to confiscate unlawful crude petroleum oil and unlawful crude petroleum products, as defined by the laws of the State of Texas. For the further reason that such suit as is contemplated by H. B. 581 above referred to is in the nature of a suit in rem; and that such suit looking to the confiscation of such oil and oil products can only be brought in a State Court of competent jurisdiction in Travis County, Texas; and that any rule or order of this Court requiring [fol. 108] the State through its duly constituted officers to maintain a suit in rem in this Court sitting in bankruptcy, or to maintain a suit looking to the collection of the proceeds brought after a sale by this Court by such unlawful oil and unlawful products in this Court, would amount to a suspension by this Court sitting in bankruptcy of a valid penal statute of the State of Texas and the valid rules and regulations of the Railroad Commission looking to the conservation of the natural resources of the State of Texas.

XII

That if this oil is sold, the State will lose its right to adjudicate its title and interest in and to said oil.

XIII

That this Court, in its order of the 13th day of February, 1936, wherein said oil is ordered sold, so states in the order

that it appears to this Honorable Court that by selling said oil the interests of all claimants, including the State of Texas, will be conserved and promoted pending a determination of the claims of the various claimants, including the State of Texas. That The Court at that time thereby recognized that the State of Texas had a claim in and to said oil.

Wherefore, by virtue of the premises, plaintiff, State of Texas, prays permission of this Honorable Court to file suit in the District Court of Travis County, Texas, to confiscate the above described oil and to make defendants thereto, the Trinity Refining Company and David Donoghue, Trustee, so that the rights of all claimants in and to said oil can be adjudicated; and further prays that this Honorable Court modify its order of February 13, 1936, ordering the Trustee, David Donoghue, to sell said oil, and [fol. 109] now order said Trustee to hold said oil in his posession pending adjudication of the title in and to said oil.

William McCraw, Attorney General of Texas. W. J. (Dick) Holt, Assistant Attorney General. William C. Davis, Assistant Attorney General. Joe Sharp, Assistant Attorney General. C. M. Kennedy, Assistant Attorney General.

In United States District Court

[Title omitted]

Debtor's Answer to Motion of the State of Texas for Permission to Proceed in Confiscation Proceedings Against 69,900 Barrels of Oil Now in Possession of the Trustee

To the Hon. James C. Wilson, Judge of said Court:

Comes now Trinity Refining Company, a corporation, Debtor in the above entitled and numbered cause, by its attorneys and for answer to the motion of the State of Texas for permission to proceed in confiscation proceedings against 69,900 barrels of oil now in the possession of [fol. 110] David Donoghue, Trustee herein, would show to the Court:

1

In a certain cause styled The State of Texas vs. V. E. Jackson, et al., in the 126th Judicial District Court of Travis County, Texas, being docket No. 56252, which suit was a suit instituted by the Attorney General of the State of Texas in the name of the State against V. E. Jackson, et al., to recover fines and penalties for alleged violations of the conservation laws of the State, the Receivers appointed by the State Court, J. C. Clopton and Bullock Hyder, filed a motion on November 20th, 1935, in the State Court in which they alleged that they had found approximately 60,000 barrels of fuel oil, describing the same, which belonged to the defendants and asking to be permitted to take into their custody and control as Receivers said oil as the property of the defendants. That the oil referred to and mentioned in such motion of said State Receivers was and is the same and identical oil referred to as the 69,900 barrels of oil now in the custody of David Donoghue, Trustee in this proceeding. The State Court, upon the filing of such motion and upon a hearing thereon, found said oil to be the property of the defendants and ordered the same taken into the custody and control of said Receivers as the property of the defendants. That present at and participating in said hearing were members of the staff of the Attorney General of Texas representing the plaintiff, the State of Texas.

The Debtor would show that upon the hearing aforesaid, there was no motion filed on behalf of the State of Texas, nor any suggestion made by the Assistants Attorney General present and participating in said hearing that the oil in question was illegal oil or was subject to confiscation by the State, and no effort was made by the State or the Attor- [fol. 111] ney General to subject said oil to confiscation proceedings, but the State and the Attorney General's office permitted and acquiesced in the order and decree of the State Court that the oil belonged to the defendant and should be recovered by the State Receivers as the property of the defendants. The Debtor says that in failing to move for its confiscation in said State Court at the time of said hearing and in suffering the judgment to be rendered by the State Court decreeing the title and possession of such oil to be in the Receivers as the property of said defendants, that the State of Texas has waived its right to be heard to

say that such oil is contraband and subject to confiscation by the State; and that such judgment by the State Court is res judicata of all matters and things that might have been raised and urged by the State on said hearing and now effectively bars the State from bringing or attempting to bring any action for the confiscation of such oil.

2

The Debtor would show that thereafter in said cause, A. C. Wylie filed his intervention, claiming the aforesaid oil and requesting the State Court to order the State Receivers to transfer and deliver said oil to him. Thereafter on the 18th day of December, 1935, said intervention came on to be heard in the State Court and after such hearing, said Court denied the request of the intervener that the Receivers be required to deliver such oil to said intervener, and it was ordered and adjudged by the State Court that the said Clopton and Hyder, the Receivers, have and recover from Wylie, the intervener, the title and possession of said oil as the property of the defendants.

The Debtor would show that at said hearing the State of Texas was represented by the Attorney General's office, and that representatives of the Attorney General were present [fol. 112] and participated in said hearing, and Debtor would show that at said hearing there was no motion filed in behalf of the State of Texas, nor any suggestion made by the Assistants Attorney General present and participating therein that the oil in question was illegal oil or was subject to confiscation by the State, and no effort was made by the State or the Attorney General to subject said oil to confiscation proceedings, but the State of Texas and the Attorney General's office permitted and acquiesced in the order and decree of the State Court that the title of such oil was in the State Receivers as the property of the defendants in the State case. The Debtor says that in filing to bring confiscation proceedings against said oil and in failing to move for its confiscation in said State Court at the time of said hearing, and in suffering the judgment to be rendered by the State Court decreeing the title and possession of such oil to be in said Receivers as the property of said defendants, that the State of Texas has waived its right to be heard to say that such oil is contraband and subject to confiscation by the State; and that such judgment

by the State Court is res judicata of all matters and things that might have been raised and urged by the State on said hearing and now effectively bars the State from bringing or attempting to bring any action for the confiscation of such oil.

3

The Debtor alleges that House Bill No. 581, Acts of the 44th Legislature, effective May 11, 1935, being commonly known as the Confiscation Act and being the statute of the State of Texas which the State in its motion urges as its authority to confiscate the oil involved herein, is wholly void and unconstitutional in that it violates the Fourteenth Amendment to the Constitution of the United States, and that no proceedings under such statute by the State for the confiscation of this oil would be valid.

[fol. 113] 4

The Debtor would show that its creditors are innocent of any and all wrongs and violations which the State charges were committed with reference to the aforesaid oil; that said creditors did not participate directly or indirectly in any of the violations charged by the State to have been committed with reference to such oil and had no knowledge of the commission of such violations, if any there were. The Debtor expressly denies that such oil was illegally produced or is the product of illegally produced oil, or that any laws of the State or rules and regulations of the Railroad Commission were violated in connection with its production, processing, handling or transportation, but the Debtor says that in no event should its creditors, who are wholly innocent as aforesaid, be penalized by the loss of this oil through confiscation proceedings. The Debtor would show that it and its creditors are and of right ought to be entitled to the full uses of said oil; that the oil is now situated in an open earthen pit and is every day subjected to the hazards of fire and damage by the elements, as well as the ordinary evaporation and depreciation to which exposed petroleum is necessarily subjected. That there is now a market in which this oil can be presently sold; that a tender for its sale has been granted by the Railroad Commission of Texas, and the spirit and purpose of conservation and conservation laws require that this oil should be immediately removed from the earthen pit in which it is stored and put

into ordinary and legitimate commerce for the use and benefit of mankind. That the proceeds of this oil will make a substantial payment to the creditors of the Debtor and such creditors are entitled to have the oil sold and the proceeds paid to them upon their debts.

5

By virtue of the finding and decree of the State Court aforesaid, adjudging the title of said oil to be in the de- [fol. 114] fendants, of which this Debtor is one, and by virtue of the fact that said oil is the property of this Debtor, this Court, under the terms and provisions of Section 77-b of the Bankruptcy Act of 1898 as amended, has exclusive jurisdiction of such property of the Debtor and is bound under the law to retain such jurisdiction over said property and to itself administer the same; and is powerless to surrender the same to any other person or tribunal.

Wherefore, the Debtor prays that the motion of the State to be permitted to proceed to institute confiscation proceedings against this oil be in all things denied, and that the Trustee herein be directed forthwith to sell said oil and to deposit the proceeds of such sale in the registry of this Court for such disposition as the Court may hereafter determine shall be meet and proper.

—— ——, —— ——, Attorneys for the Debtor.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER FOR RELEASE OF OIL TO RECEIVERS, ETC.

On the 30th day of March, 1936, came on for hearing the amended motion of the State of Texas, acting by and through William McCraw, its Attorney General, for permission to proceed in confiscation proceedings against 69,900 barrels, more or less, of weathered and/or topped [fol. 115] crude oil in an earthen pit in Upshur County, Texas, and the following oil in Gregg County, Texas: About 5,000 barrels, more or less, in steel storage tank No. 5 on the Phillips lease, and about 10,000 barrels, more or less, of fuel oil in tank No. 10 on the Callum lease, and approxi-

mately 25,000 barrels, more or less, of oil in tank No. 25 on the Callum lease, and about 37,500 barrels, more or less, of fuel oil in tank No. 37 on the Hanbury lease; and after hearing evidence and argument thereon, the Court finds that Trinity Refining Company, Debtor herein, has no interest in the 69,900 barrels, more or less, of weathered and/or topped crude in the earthen pit in Upshur County, Texas, and that Trinity Refining Company, Debtor herein, does own the oil in steel storage in Gregg County, Texas.

It Is, Therefore, Ordered that David Donoghue, Trustee herein, release his possession to J. C. Clopton and Bullock Hyder, Receivers, of 69,900 barrels, more or less, of weathered and/or topped crude of a gravity of approximately 24 gravity and being situated in what is known as the Farris earthen pit in the Augustine Survey in Upshur County, Texas, and being the exact, same and similar oil described and mentioned in a judgment rendered in Cause No. 9217-C styled A. C. Wiley vs. East Texas Oil & Refining Company in the Special District Court of Gregg County, Texas, and being the same oil described in the plea of intervention filed by A. C. Wiley in Cause No. 56252, styled The State of Texas vs. V. E. Jackson, et al., in the 126th Judicial District Court of Travis County, Texas, and being the same oil that was described in a judgment rendered in cause No. 56252 styled The State of Texas vs. V. E. Jackson, et al., in the 126th Judicial District Court of Travis County, Texas, on the motion of A. C. Wiley to vacate the receivership therein as to the oil therein described; and

It Is Further Ordered that the said David Donoghue, Trustee, have and exercise no further possession, control [fol. 116] or management over said 69,900 barrels, more or less, of oil contained in the earthen pit above described; and

It Is Further Ordered that David Donoghue, Trustee, retain possession, control and management of the oil located in Gregg County, Texas, described as approximately 5,000, more or less, barrels of oil in steel storage tank No. 5 on the Phillips lease, Block 77, M. Dillard Survey, and approximately 10,000 barrels; more or less, of fuel oil in tank No. 10 on the Callum lease in the Rhodes Survey, and approximately 25,000 barrels, more or less, of oil in tank No. 25 on the Callum lease in the Rhodes Survey, and also about 37,500 barrels, more or less, of fuel oil located

in tank No. 37 on the Hanbury lease in the Hokit Survey, subject to the further orders of this Court.

Dated and entered this the 26 day of June, 1936.

James C. Wilson, United States District Judge.

In United States District Court

[Title omitted]

Request to File Findings of Fact and Conclusions of Law

To the Honorable James C. Wilson:

Come now the State of Texas, William McCraw, Attorney General of Texas, W. J. Holt, C. M. Kennedy, Joe Sharp, and William C. Davis, Assistants Attorney General, and J. C. Clopton and Bullock Hyder, Receivers, and request [fol. 117] that the Court prepare and file findings of fact and Conclusions of Law as a basis for the entry of the judgment, wherein this Honorable Court refused to grant the motions heretofore filed in this cause by the undersigned all as shown in said judgment entered by this Court.

Respectfully submitted, William McCraw, Attorney General of Texas. W. J. Holt, Assistant Attorney General. Joe Sharp, Assistant Attorney General. C. M. Kennedy, Assistant Attorney General. William C. Davis, Assistant Attorney General.

In United States District Court

No. 1939

In the Matter of Trinity Refining Company, a Corporation, Debtor

In Proceedings for Corporate Reorganization

Findings of Fact and Conclusions of Law

Before Honorable James C. Wilson, District Judge

The movants, the State of Texas, William McCraw, Attorney General of Texas, W. J. Holt, Joe Sharp, C. M. Kennedy and William C. Davis, Assistants Attorney Gen-

eral, and J. C. Clopton and Bullock Hyder, Receivers, having filed herein a written request that the Court prepare and file Findings of Fact and Conclusions of Law as a basis for the entry of a judgment herein, from which the movants are appealing to the Circuit Court of Appeals [fol. 118] of the United States for the Fifth Circuit at New Orleans, I hereby make the following Findings of Fact and Conclusions of Law;

There was no evidence introduced either by the Receivers Clopton and Hyder and the State of Texas on the one hand, or by the Debtor, Trinity Refining Company, on the other, as to the facts involved herein; but by stipulation in open Court of all said parties, the allegations in the various motions, pleas, and other written presentations to this Court as to the pleadings and motions filed in the State Courts, and the action of the Courts thereon, are to be taken as proved, and the Receivers Clopton and Hyder, and the State of Texas having filed herein their request therefor, I make Findings and Conclusions as follows:

Findings of Fact

I

I find that on the 12th day of October, 1935, the State of Texas, by its duly elected, qualified and acting Attorney General, William McCraw, entered suit in the District Court of the 126th Judicial District of Texas in Travis County, Texas, which was numbered 56,252 on the docket of that Court. One of the defendants was the debtor in the instant cause; namely, the corporation, Trinity Refining Company. The State sought enforcement and collection of fines, penalties and interest alleged to aggregate 791,000 and to have been incurred by numerous violations on the part of the defendants of the oil conservation laws of the State of Texas (Article 6036, R. C. S. of Texas, Acts 44th Legislature, p. 180, Chapter 76, Section 12, Acts 1935).

II

That the State of Texas in said suit also asserted, and is still so asserting, a statutory lien as is provided for in [fol. 119] Article 1373 of the said state statutes upon all of the properties and estates of the said Trinity Refining Company and also the foreclosure of such lien to secure the payment of the amounts so claimed. In said suit the

State of Texas prayed for the appointment of receivers to aid the foreclosure of the statutory lien asserted, and also asked that the receivers be empowered to take over, hold and operate the property of the defendants for the purpose of securing the payment of the alleged fines, penalties and interest.

III

Citation and notice were duly served upon Trinity Refining Company and the other defendant, notifying them to appear on the 19th day of October, 1935, and show cause why receivers should not be appointed as prayed for and why an injunction should not issue against them; and upon the day appointed, the parties defendant, including Trinity Refining Company, came not. Thereupon, the Attorney General announced ready for trial. The Court directed the Attorney General to proceed with the hearing, which was done, and in due course the testimony of a number of witnesses was received. After considering the matter and the argument of counsel, the Court found that the appointment of receivers to take charge of the properties of Trinity Refining Company and the other defendants was amply warranted.

IV

The State District Court, following the hearing, on the 25th day of October, 1935, entered its order appointing J. C. Clopton and Bullock Hyder receivers to take over and authorized them to take over all the properties, estates and assets of all of the defendants, including Trinity Refining Company, described in the order of the Court, and directed them to hold said properties pending the trial of said cause [fol. 120] No. 56252 in order to conserve the property pending the foreclosure of the statutory lien asserted in said cause.

V

Thereafter the State Court receivers qualified by giving the necessary bond and taking the oath required, and on October 30th, 1935, actually took charge of the properties and estates of Trinity Refining Company and the other defendants, described in the order of the Court, and continued to hold said properties until the 18th day of December, 1935, when they were summarily dispossessed by David Donoghue, the Trustee appointed by this Court in the instant cause.

VI

On the 14th day of December, 1935, the State of Texas, by and through its Attorney General, filed in the District Court for the 98th Judicial District of Texas, Travis County, another suit, being cause No. 56476, in which it sought to recover delinquent taxes alleged to have been incurred by reason of the defendants' activities in refining, manufacturing, producing, blending and compounding motor fuel and by making the first sale, distribution and use thereof within the State of Texas; also penalties and interest alleged to have accrued by reason of the operation of certain of the defendants' properties. The total claim asserted in this suit was $104,084.97, but by amendment filed January 8th, 1936, the claim was increased to over $300,000.00. The defendants named in that suit were exactly the same as those in cause No. 56252. The suit was alleged to be filed pursuant to the provisions of H. B. 247 passed by the 43rd Legislature of said State, as amended by H. B. 749, Acts of the 44th Legislature, known as Article 7065-a, Revised Civil Statutes of Texas. The [fol. 121] State also sought in this case foreclosure of a lien created by the State statutes and claimed by the State to be made by the statutes first and prior to any and all other liens upon the properties of any disributor of motor fuel as defined in said statutes. The State also asked for the appointment of receivers in aid of the foreclosure sought.

VII

Immediately upon the filing of the last mentioned suit, the State District Judge declined at that time to appoint receivers to take charge of the properties and assets of said defendants, for the reason assigned by the Court that the receivers appointed in cause No. 56252 by another Court of the same jurisdiction were then in possession of the properties and estates involved pursuant to Court order.

VIII

Citation and notice were duly issued in cause No. 56476 and service thereon was had.

IX

On the 18th day of December, 1935, Trinity Refining Company, a corporation, one of the defendants in causes

Nos. 56252 and 56476, pending in the State District Courts, filed its petition as debtor in the United States District Court for the Northern District of Texas at Fort Worth under the provisions of Section 77-b of the Bankruptcy Act of 1898, for reorganization under the terms and provisions of said Section 77-b. The United States District Judge found that said petition was filed in good faith and approved the same as properly filed. Simultaneously with the filing of said petition, the Debtor filed a plan of reor- [fol. 122] ganization. In accordance with the prayer in said petition, the Court appointed a trustee of the properties of Trinity Refining Company, a corporation, Debtor. On the 18th day of December, 1935, David Donoghue was appointed Trustee by the Court, and qualified on the same day, and in keeping with the Court's order did on the 19th day of December, 1935, demand of and receive from the State Receivers, J. C. Clopton and Bullock Hyder, the properties and estates of Trinity Refining Company, Debtor. The United States District Judge directed that notice should issue under Section 77-b to all parties whose interests might be affected by the proposed plan of the Debtor for reorganization to appear before the United States District Court at Fort Worth at ten o'clock A. M., on the 13th day of January, 1936, and be heard in reference to the Debtor's proceedings for corporate reorganization and in reference to the Debtor's petition and continuing possession in the hands of the Trustee of the properties of the Debtor, and make such objections, if any they had, to the pursuing of said proposed plan of reorganization.

X

Cause No. 56476 pending in the 98th Judicial District Court of Travis County, Texas, was on the 8th day of January, 1936, upon motion of the State of Texas, plaintiff, transferred to the 126th Judicial District Court of Travis County. The District Judge of the 126th Judicial District Court did on January 8th, 1936, enter an order appointing J. C. Clopton and Bullock Hyder receivers of the properties and estates of Trinity Refining Company and the other defendants, reciting that said appointment was in aid of the foreclosure of the statutory lien involved in cause No. 56476. The District Judge required no additional bond

of these Receivers, declaring that the original bond given by them in cause No. 56252 should be adequate.

[fol. 123] XI

On the 13th day of January, 1936, the State of Texas, through William McCraw, its Attorney General, and J. C. Clopton and Bullock Hyder, Receivers in the state cases, referred to, filed their pleas to the jurisdiction of the United States District Court sitting at Forth Worth in pursuance of the provisions of Section 77-b of the Bankruptcy Act, in response to the order theretofore entered by the United States District Judge directing the Trustee appointed by him to take over from the State Court Receivers certain properties and estates of Trinity Refining Company, a corporation, Debtor, and asserting further, without waiving their plea for the jurisdiction, that the petition as filed by Trinity Refining Company, Debtor, was not filed in good faith as contemplated by the amendment to the Bankruptcy Act, and that the plan as submitted was not feasible, and for such reasons, the same should be dismissed.

XII

On that same day of the filing of the plea to the jurisdiction and the motion in opposition to the approval of the petition of the Debtor and approval of the plan of reorganization, the State of Texas and the State Court Receivers filed a motion requesting the Court to stay all proceedings in the Federal Court under Section 77-b and grant the State and the Receivers the right to prosecute their asserted penalty claims and asserted tax claims in the suits pending in the State Courts and that all proceedings be stayed in the Federal Court until such suits for penalties and suits for taxes were prosecuted to final judgment in the State Courts; which motions and answers are made a part of the bill of exception filed in this record.

[fol. 124] XIII

The United States District Court postponed the hearing set for the 13th day of January, 1936, until the 14th day of January, 1936, and on said date said hearing began, and at said hearing there was presented to and considered by the Court, among other matters and things, the several

pleas to the jurisdiction and motions of the State of Texas and the State Receivers, and on the 15th day of January, 1936, the Court entered its order which, among other things, overruled the several pleas to the jurisdiction and motions of the State of Texas and said State Receivers in all things and continued the Trustee theretofore appointed in possession and control of the properties and estates of the Debtor and continued in full force and effect the injunctions theretofore issued restraining any interference by any one with the Trustee in the possession and control of the properties and estates of the Debtor, and in addition thereto, enjoined and prohibited the institution and prosecution of any suit or suits against the said Debtor; to all of which action the State of Texas and J. C. Clopton and Bullock Hyder, State Receivers, duly excepted. Said order is made a part of the bill of exception and set out in full.

XIV

On the 22nd day of January, 1936, the State of Texas, by and through its Attorney General, filed its motion in this cause directed to this Court, requesting the Court to correct and modify the judgment, order and decree entered on the 15th day of January, 1936, and grant the State of Texas authority to continue the prosecution of the cases pending in the State Courts, to-wit, causes Nos. 56252 and 56476, as against all defendants in said causes other than Trinity Refining Company, a corporation, Debtor, and the [fol. 125] Court did on the 22nd day of January, 1936, hear said motion and granted the same. Said motion and order are made a part of the bill of exception and set out in full.

XV

On the 18th day of February, 1936, said State Receivers presented their motion in the two causes pending in the State Court, they being treated as one by the Court, and in response thereto, the District Court for the 126th Judicial District, Travis County, entered its order directing the two receivers to take appropriate action before the Federal Court in the instant cause, seeking to have returned to them the properties and estates of Trinity Refining Company which had been summarily taken from them by David Donoghue, the Trustee appointed by this Court,

and seeking to have the injunction dissolved which this Court had issued restraining them. The State Receivers claimed and the State Court decreed that this action was taken in order to avoid unseemly conflicts between the State District Courts and the United States District Court for the Northern District of Texas, sitting at Fort Worth.

XVI

Pursuant to the order of the State District Judge, directing the Receivers to institute appropriate proceedings in this cause, seeking the return of the properties of Trinity Refining Company, Debtor, to them, and also seeking the dissolution of the injunctions which this Court had issued restraining them, said Receivers filed their motion in this cause, joined by the State of Texas, asserting that this Court was without jurisdiction to take the properties of Trinity Refining Company, Debtor, from them by summary order, since the State Court suits in which statutory liens were asserted had been filed prior to the filing of the [fol. 126] petition of Trinity Refining Company, a corporation, for corporate reorganization under Section 77-b in this Court, and that citation had issued in each of said causes, and that same were duly served, and that receivers had been appointed by the State District Judge in the State's suit wherein penalties were sought to be recovered against Trinity Refining Company and others, with directions and authority to take into their possession the properties of Trinity Refining Company, and that they had done so and were in possession thereof at the time the same were taken over from them by David Donoghue, Trustee appointed by this Court in said corporate reorganization proceeding. Said motion is made a part of the bill of exception and set out in full.

XVII

Simultaneously with the filing of the motion set out in the preceding paragraph, the State of Texas, through its Attorney General, filed a motion wherein it asserted that the injunctions theretofore issued by this Court in this cause against all persons from interfering with David Donoghue, Trustee, in the possession of the properties of Trinity Refining Company, Debtor, and the issuance of the injunctions whereby the institution of any suits or causes

of action against Trinity Refining Company, Debtor, were enjoined, which was in effect a suit against the State of Texas in violation of the Eleventh Amendment to the Constitution of the United States, and for such reason such motion should be granted and such injunctions against the State should be dissolved.

XVIII

The State of Texas, through its Attorney General, at the time of the filing of the motion referred to in the preceding paragraph and subject to the pleas to the [fol. 127] jurisdiction filed in this Court by the State, by amended motion in this cause seeks permission to institute confiscation proceedings in a Court of competent jurisdiction in Travis County, Texas, against approximately 77,000 barrels of crude oil in steel storage and now in the hands of David Donoghue, Trustee in this cause, being the property of Trinity Refining Company, Debtor, and which oil the State of Texas in its motion alleges is illegal and subject to confiscation under the statutes of the State of Texas. In addition to the permission and subject to the pleas to the jurisdiction the State, through its Attorney General, requested the right to institute confiscation proceedings against approximately 69,000 barrels of crude oil situated in what is known as the Farris Pit in the Augustine Survey in Upshur County, Texas, it being alleged in said motion that said oil was illegal under the statutes of the State of Texas and was in the possession of the State Court Receivers prior to the time that David Donoghue, Trustee in this cause, took the same into his possession under the order of the Court appointing him.

XIX

The Debtor filed its motion to dismiss the motion of the State of Texas and J. C. Clopton and Bullock Hyder, Receivers, as set out in paragraphs XVI and XVII above, for an order dissolving the injunction heretofore issued by this Court against the Receivers from interfering with the possession of David Donoghue, Trustee, and for an order directing David Donoghue, Trustee, to turn over to said Receivers the properties and estates of Trinity Refining Company, Debtor, because the State of Texas and the State Receivers had theretofore filed pleas and motions to this Court involv-

ing the same and all of the matters and things that they urged in their motions referred to in paragraphs XVI and XVII above, which motion to dismiss is fully set out in this [fol. 128] bill of exception, and the Court had on the 15th day of January, 1936, after duly considering all said matters and things, overruled, refused and denied the pleas and motions of the State and said Receivers.

XX

The Debtor answered the amended motion of the State for authority to proceed in confiscation proceedings against approximately 77,000 barrels of crude oil in steel storage and approximately 69,000 barrels of crude oil in the Farris Pit, and claimed, among other things, that the State of Texas was estopped from claiming that the oil was illegal oil and subject to confiscation, because of the proceedings had in the State Court in which the title to said oil was in question and the State and the State Receivers were parties to the suit that adjudicated ownership of the oil in Trinity Refining Company and other defendants, and claiming that the creditors of the Debtor were innocent of any wrongs and violations which the State charged were committed with reference to the aforesaid oil, if any there had been, and that said creditors did not participate, directly or indirectly, in any of the violations charged by the State to have been committed with reference to said oil, if any there were, and that the oil in question was the property of the Debtor and under the provisions of Section 77-b the Federal Court had exclusive jurisdiction of the properties of the Debtor. Said answer is fully set out in the bill of exception.

XXI

The Court heard the motions of the State and the State Receivers referred to in paragraphs XVI, XVII and XVIII above and the motion and answer of the Debtor referred to in paragraphs XIX and XX above, and on the 30th day of May, 1936, the motion of the Debtor to dismiss the motions [fol. 129] of the State of Texas and the State Receivers referred to in paragraph XVI above, was sustained by the Court; to which action of the Court the State of Texas and said Receivers duly excepted; which order is set out above and made a part of this bill of exception. On the 30th day of

May, 1936, the Court granted the State's motion to set aside all injunctive orders heretofore issued in so far as the same restrained the State of Texas from prosecuting causes No. 56252 for the recovery of penalties and No. 56476 for the recovery of taxes, penalty and interest, and dissolved all injunctions that would conflict with this order; which order is made a part of this bill of exception. And on the 30th day of May, 1936, the Court entered an order on the State's motion to confiscate certain oil, directing David Donoghue, the Federal Trustee, to release all possession and control that he had and exercised over approximately 69,900 barrels of oil in the earthen pit called the Farris Pit in the Augustine Survey in Upshur County, Texas, and directed the said David Donoghue, Trustee, to retain possession of the oil in steel storage then in the possession of said Trustee; to all of which action the State of Texas duly excepted and gave notice of appeal. Said order and said exception is made a part of this bill of exception and incorporated in full above.

CONCLUSIONS OF LAW

L

The holdings in the various decrees and orders entered by this Court upon the motions and answers filed herein by the parties are to be considered as the conclusions of law arrived at by the Court.

James C. Wilson, United States District Judge.

[fol. 130] ORDER SETTLING BILL OF EXCEPTIONS

Thereafter, and within the time allowed by law, the appellants, the State of Texas and J. C. Clopton and Bullock Hyder, State Court receivers, duly tendered this their Bill of Exceptions herein, which having been seen and examined by the Court and counsel is by the Court allowed, and approved by the Honorable James C. Wilson, District Judge of said Court, before whom said proceedings were had, and the same is ordered by the said Court to be filed and made a part of the record herein, which is now accordingly done.

Given under the name of the Judge of said Court before whom said proceedings were had this the 26 day of June, 1936.

James C. Wilson, United States District Judge for the Northern District of Texas, Fort Worth Division.

The above and foregoing bill of exceptions is hereby approved.

William McCraw, Attorney General of Texas; W. J. Holt, C. M. Kennedy, Joe Sharp, William C. Davis, Assistant Attorney General, Attorneys for the State of Texas. W. B. Harrell, Attorney for David Donoghue, Trustee in Bankruptcy.

Let the Bill be filed and the filing shown of record as this 26 day of June, 1936.

James C. Wilson, District Judge.

[fol. 131] IN CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE FIFTH CIRCUIT

Appeal in the Matter of Trinity Refining Company, a Corporation, Debtor, Being No. 1939 in Proceedings for Corporate Reorganization, Pending in the District Court of the United States for the Northern District of Texas, Fort Worth Division.

PETITION FOR APPEAL—Filed June 27, 1936

To the Honorable, the Judges of the Circuit Court of Appeals for the Fifth Circuit of the United States:

Your petitioners, the State of Texas and J. C. Clopton and Bulloc . Hyder, Receivers appointed by the District Court of the 126th Judicial District of Travis County, Texas, respectfully represent:

1

The State of Texas and J. C. Clopton and Bullock Hyder, Receivers, were movants in a certain proceeding in the matter of Trinity Refining Company, a corporation, debtor,

No. 1939 in Proceedings for Corporate Reorganization, pending in the District Court of the United States in and for the Northern District of Texas, Fort Worth Division, wherein Trinity Refining Company, a corporation, filed its petition for corporate reorganization under the provisions of Section 77b of the Act of Congress amendatory to the Bankruptcy Act of 1898 (Sec. 207, Title 11, U. S. C. A.)

2

In cause No. 56,252, in the 126th Judicial District Court of Travis County, Texas, the State of Texas, pursuant to [fol. 132] the provisions of Title 102 of the Revised Civil Statutes of the State of Texas as amended, did on the 12th day of October, 1935, file a suit to recover penalties not to exceed $1,000.00 per day, as provided by law, alleging seven hundred ninety-one violations of the oil and gas conservation statutes of the State of Texas. The defendants in the suit were V. E. Jackson, Trinity Refining Company, incorporated but having forfeited its rights to do business in Texas at the time of the filing of the suit, but later reinstating its corporate right by payment of a franchise tax; J. B. Sowell; T. W. Sowell; C. B. Sowell and the Minor Pipe Line Company. By amendment filed on October 25, 1935, the State pleaded its statutory lien upon the properties of defendant corporation and sought a foreclosure of its lien for the collection of the penalties and asked for the appointment of receivers. The hearing on the application for the State's receivership was heard on October 25, 1935, after statutory notice, and the Court appointed Bullock Hyder and J. C. Clopton, receivers of the properties of Trinity Refining Company and the pipe line known as Minor Pipe Line Company, together with three oil wells on the J. B. Walker Lease in Gregg County. In this suit the State charged a conspiracy between the parties defendant to violate the conservation laws of the State and alleged that the properties were so managed, owned and operated by the defendants jointly that the true ownership was a matter peculiarly within the knowledge of the defendants. On November 25, 1935, the Receivers made application to take into receivership a pit of oil containing substantially 70,000 barrels of fuel oil and other oil in tanks of substantially 75,000 barrels. A. C. Wylie intervened in this suit, and his application to modify the order so as not to include the fuel

oil stored in the pit was heard on December 18, 1935, the Court entering an order denying the intervener the relief sought.

In cause No. 56,476, in the District Court of Travis County, the State of Texas filed its suit on December 14, [fol. 133] 1935, in behalf of the Comptroller of the State of Texas against the same defendant, asserting a statutory lien for delinquent tax on motor fuel under the Motor Fuel Law of the State of Texas. The State in this suit asked for the appointment of Receivers to take charge of the property and for a foreclosure of its lien. The amount alleged to be delinquent, including taxes and penalties, by amendment was asserted to be $323,644.03: On January 8, 1936, in response to the State's application, the same Court appointed the same Receivers and provided in the order that the bond theretofore given by the Receivers then appointed and acting in Cause No. 56,252, was sufficient bond.

The defendant in cause No. 56,252, filed its petition for removal to the United States District Court for the Western District of Texas, and sought an injunction against the Receivers in operating the properties. Upon hearing of this application and a motion to remand, the application was denied and the cause was remanded to the State Court. Subsequently, on December 18, 1936, the Trinity Refining Company as Debtor, filed its petition under Section 77b of the Bankruptcy Act, in the United States District Court for the Northern District of Texas, and submitted with the petition when filed a plan of reorganization, and on the same day, December 18, 1935, the United States District Judge, without notice of any kind, entered an order containing, among other things, the following:

"And it is further ordered that said debtor and J. C. Clopton and Bullock Hyder, Receivers appointed by the District Court of Travis County, 126th Judicial District of Texas, and any and all persons having control or possession of any of the properties or estate of said debtor, forthwith deliver to said Trustee herein all of the property, assets, and effects of debtor, now in the possession [fol. 134] or control of them or either of them * * * and all creditors of said debtor, as well as each of their attorneys, agents and servants, and all sheriffs, marshals, and other officers, deputies and their employees, be and

they are hereby jointly and severally restrained and enjoined from removing, transferring, or otherwise interfering with the property, assets and effects of the above named debtor, and from prosecuting, executing or suing out of any Court any process, attachment, or other writ for the purpose of taking possession, impounding or interfering with any property, assets, or effects of said debtor, and from molesting, disturbing, or interfering with the Trustee named and appointed herein and hereby in the discharge of his duties."

The State and J. C. Clopton and Bullock Hyder on the 13th day of January, 1936, filed a plea to the jurisdiction of the Federal Bankruptcy Court asserting that the State Court was in possession of the properties of the Trinity Refining Company and was being held by them as receivers pending the foreclosure of the State's lien. The Receivers were never authorized by order of the Court appointing them to file any pleas in the Bankruptcy Court. This plea to the jurisdiction was overruled. Later, the State of Texas and J. C. Clopton and Bullock Hyder in their capacities as Receivers, and being duly authorized by order of the Court appointing them to bring appropriate proceedings in the Bankruptcy Court looking to the return of the properties of the Trinity Refining Company to them, which had been summarily taken from them by the Bankruptcy Trustee, the plea in the Federal Court setting forth substantially that prior to the filing by the Trinity Refining Company of its petition for corporate reorganization in the Bankruptcy Court, that they were the duly appointed, qualified and acting Receivers in certain causes pending in a State District Court of co-ordinate jurisdiction, and [fol. 135] that they were appointed by orders of that Court pursuant to the filing of suits and prayer therefor in certain suits whereby the State of Texas was asserting:

(a) A lien upon all of the property of Trinity Refining Company, a corporation, created by the laws of the State of Texas, to secure the payment of certain penalties incurred by Trinity Refining Company on account of having violated the conservation laws of the State of Texas, said penalties being sued for and alleged to be owing by Trinity Refining Company as a result of such violations, said Receivers being appointed in aid of foreclosure of said lien.

(b) A lien upon all of the property of Trinity Refining Company, a corporation, and others given by the laws of Texas to secure the payment of certain taxes, fines and penalties sued for in said suit and alleged to be owing by Trinity Refining Company and others by reason of the processing of gasoline from crude petroleum oil, said receivers being appointed in aid of the foreclosure of said lien.

Further, that the Receivers appointed by such State Court were in possession of the properties of the Trinity Refining Company and were asserting dominion and control over same pursuant to the orders of the Court appointing them, said property being held by said State Court Receivers for the purpose of preserving the properties of Trinity Refining Company and others pending the outcome of such suits brought by the State of Texas, and the foreclosure of asserted statutory liens.

That not withstanding the fact that the State Court had appointed Receivers pursuant to suits filed by the State of Texas for the recovery of taxes, fines and penalties and the foreclosure of statutory liens, and notwithstanding [fol. 136] the fact that such State Court Receivers were in possession and control of the properties of Trinity Refining Company and others prior to the filing of the petition for corporate reorganization by the Trinity Refining Company in the Federal Bankruptcy Court, the United States District Court entered its order directing David Donoghue, Trustee in said corporate reorganization proceedings to summarily take over from the State Court Receivers the properties of the Trinity Refining Company without first moving the State Court to release said properties and without observing due comity between Courts of coordinate jurisdiction, and deliberately bringing about a condition resulting in unseemly conflicts between a State and Federal Court.

3

The State of Texas and the Receivers asserted in their motion that inasmuch as State Courts of coordinate jurisdiction had entertained suits and had taken jurisdiction of the same brought by the State of Texas against Trinity Refining Company and others, seeking the recovery of taxes, fines and penalties, and the assertion in said State

Court suits of statutory lines, that the order entered by the United States District Court was unauthorized, and that the State Court having first taken jurisdiction of the res, that they should be permitted to hold same without interference from the Court of the United States sitting in bankruptcy.

4

The order of the Federal Bankruptcy Court overruling such motions of the State and Receivers in the proceedings for Corporate Reorganization was erroneous for the reason that it appears from said motion and supporting proof that State Courts of co-ordinate jurisdiction by virtue of suits [fol. 137] filed in said Courts by the State of Texas, seeking the recovery of taxes, fines and penalties and the enforcement of statutory liens securing payment of same, and the subsequent appointment of Receivers by said Courts to take charge of the properties of Trinity Refining Company and others had jurisdiction of said suits upon a date prior to the filing of the petition for corporate reorganization under Section 77b by Trinity Refining Company, a corporation, in the Federal Bankruptcy Court, the entry of said order denying said motions being further erroneous by reason of the fact that the proceedings in the State Court were not equity receiverships as contemplated by the provisions of Section 77b of the Act of Congress amendatory to the Bankruptcy Act of 1898 (Section 207, Title 11, U. S. C. A.)

5

Without waiving the Pleas to the Jurisdiction theretofore filed, the State of Texas, by and through William McCraw, Attorney General of the State of Texas, filed its motion in the Proceedings for Corporate Reorganization, in the United States District Court, moving said Court to enter its order authorizing the State of Texas, through its Attorney General, to institute in a Court of competent jurisdiction in Travis County, Texas, confiscation proceedings as authorized and permitted by House Bill 581, Act of the 44th Legislature, and also moving said Court to permit the State of Texas in such confiscation proceedings to make the Trinity Refining Company, a corporation, debtor, and David Donoghue, Trustee appointed by the United States District Court, parties defendant to said

confiscation suit in the State Court, the nature of the suit being to confiscate certain crude petroleum oil and the products thereof set forth in the State's motion; that on the 30th day of March, A. D. 1936, the State of Texas, through [fol. 138] its Attorney General, filed an amended motion, amplifying and enlarging the motion theretofore filed, seeking permission of the United States District Court to institute confiscation proceedings in a State Court of competent jurisdiction in Travis County, Texas, as aforesaid; that after the presentation of such motion, and after considering the answer of interveners and interested parties, the United States District Court entered its order denying the State of Texas leave to institute such confiscation proceedings in a State Court, as to a portion of said oil.

6

The action of the District Court in denying said motion was erroneous for the reason that it appeared after hearing said motion that the oil set forth in said motion was illegal oil, as defined by the statutes of the State of Texas, and that by reason thereof, the title to such oil and oil products was in the State of Texas, and that the State was authorized under the laws of said State to bring such confiscation proceedings.

7

The entry of said order denying the State's motion to proceed with the confiscation proceedings in the State Court was erroneous for the reason that it is not within the competence of the Courts of the United States to entertain any such proceedings as are authorized by the conservation laws of the State of Texas, whereby the Attorney General of the State of Texas is authorized to bring confiscation suits, looking to the confiscation of crude petroleum oil and products declared to be unlawful by the laws of the State of Texas. Said order was further erroneous for the reason that the denial of the State's motion amounted to a suspension of the valid statutes of the State of Texas, and [fol. 139] constituted an unwarranted interference with the enforcement of the police laws of the State of Texas by its duly constituted officers; and for the further reason that the proceedings in the United States District Court in Fort Worth were in the nature of bankruptcy proceedings, and the State, through its constituted authorities, sought

the right to file a suit at law in a State Court to confiscate the oil described in the State's motion in a Court of competent jurisdiction, as fixed by the statutes of the State of Texas in Travis County, Texas, and to declare the oil a nuisance and to place the proceeds from the sale thereof in the Treasury of the State of Texas; and the order of the United States District Court for the Northern District of Texas, prohibited the right of the State of Texas to bring confiscation proceedings in a Court of competent jurisdiction, whereby it could obtain what belongs to it by statute, and where the jurisdiction of such right is fixed by Texas statute.

Wherefore, the State of Texas and the Receivers, petitioners, feeling aggrieved because of such order entered on the — day of May, A. D. 1936, in the above entitled proceedings, do hereby petition for an appeal from said order to the United States Circuit Court of Appeals for the Fifth Circuit, and pray that their appeal may be allowed, and that a citation may be granted and directed to Trinity Refining Company, a corporation, debtor, in the Corporate Reorganization Proceedings, pending in the District Court of the United States for the Northern District of Texas, sitting at Fort Worth, and David Donoghue, Trustee appointed by the United States District Court in such proceedings, to appear before the United States Circuit Court of Appeals for the Fifth Circuit, to do and receive that which may appertain to justice to be done in the premises, and that a transcript of the record and evidence in said proceeding, duly authenticated, may be transmitted to the [fol. 140] said United States Circuit Court of Appeals for the Fifth Circuit.

William McCraw, Attorney General of Texas. J. C. Clopton, Receiver, Bullock Hyder, Receiver, Petitioners. W. J. Holt, Assistant Attorney General. William C. Davis, Assistant Attorney General. C. M. Kennedy, Assistant Attorney General. Joe Sharp, Assistant Attorney General.

UNITED STATES OF AMERICA,
Northern District of Texas:

William C. Davis, one of the duly appointed, qualified and acting Assistants Attorney General, being duly sworn, according to law, deposes and says:

That this appeal is not intended for delay, but that he verily believes that injustice has been done.

William C. Davis.

Sworn to and subscribed before me, on this 26 day of June, A. D. 1936. Mary Clark, Notary Public Dallas County. (Seal.)

WAIVER OF ISSUANCE AND SERVICE OF CITATION AND NOTICE OF APPEAL

The undersigned attorney of record for David Donoghue, Trustee in Bankruptcy, acknowledges receipt of a copy of the foregoing petition to the United States Circuit Court of Appeals for leave to appeal, and here now expressly [fol. 141] waives the issuance of and service of citation on appeal.

W. B. Harrell, Attorney for David Donoghue, Trustee in Bankruptcy.

IN UNITED STATES DISTRICT COURT

[Title omitted]

TRUSTEE'S PETITION FOR APPEAL—Filed June 29, 1936

To the Hon. James C. Wilson, United States District Judge:

David Donoghue, Trustee of Trinity Refining Company, Debtor herein, feeling aggrieved by the decree and order tendered and entered in the above entitled cause on the 30th day of May, 1936, dissolving the injunctions theretofore issued against the State of Texas from prosecuting its tax suit against the Debtor in the District Court of Travis County, Texas, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Fifth Circuit for the reasons set forth in the assignment of errors filed herewith. And the Appellant would show that the State of Texas has appealed from certain orders made and entered by this Court on said 30th day of May, 1936, in this proceeding, and that a bill of exception has been settled with the State of Texas as appellant

and David Donoghue, Trustee, as appellant, desires to [fol. 142] prosecute an appeal from certain orders included in said record and bill of exceptions, and that said bill of exception and transcript of the record and proceedings should be considered the same as if filed by both parties as appellants.

Wherefore, the Trustee prays that his appeal be allowed as of course and that citation be issued as provided by law and that the transcript of the record and proceedings and the bill of exception aforesaid be used and considered as the transcript of the record and proceedings and bill of exception upon this Appellant's appeal.

W. B. Harrell, Attorney for David Donoghue, Trustee, Appellant.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

TRUSTEE'S PETITION FOR APPEAL—Filed June 29, 1936

To the Honorable United States Circuit Court of Appeals for the Fifth Circuit:

Comes now David Donoghue, Trustee of Trinity Refining Company, Debtor in the above entitled and numbered cause, and feeling aggrieved by the order and decree rendered and entered by the trial Court in this cause on the 30th day of May, 1936, dissolving the injunctions theretofore issued against the State of Texas from prosecuting its tax suit against the Debtor in the District Court of Travis County, [fol. 143] Texas, and now presents this, his petition for the allowance of his appeal from said decree for the reasons set forth in the assignment of errors filed herewith. And this Appellant would show that the State of Texas has appealed from certain orders made and entered by the Court on said 30th day of May, 1936, in this proceeding, and that a bill of exception has been settled with the State of Texas as appellant, and David Donoghue, Trustee, as appellant, desires to prosecute an appeal from certain orders included in said record and bill of exceptions, and that said bill of exception and transcript of the record and proceedings should be considered the same as if filed by both parties as appellants.

Wherefore, the Trustee prays that his appeal be allowed and that citation be issued as provided by law and that the transcript of the record and proceedings and the bill of exception aforesaid be used and considered as the transcript of the record and proceedings and bill upon this Appellant's appeal.

W. B. Harrell, Attorney for David Donoghue, Trustee, Appellant.

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING TRUSTEE'S APPEAL—Filed July 18, 1936

On this, the 29th day of June, 1936, there was presented to this Court the petition of David Donoghue, Trustee of [fol. 144] Trinity Refining Company, Debtor in the above entitled and numbered cause, addressed to this Court, praying for the allowance of his appeal as of course; also

There was made known to the Court that said Trustee had filed in the trial Court his petition addressed to the United States Circuit Court of Appeals for the Fifth Circuit, praying for the allowance of his appeal.

It is Ordered that the petition of said Trustee addressed to this Court, praying for the allowance of his appeal as of course, be and the same hereby granted and allowed.

And it further appearing to the Court that the bill of exceptions settled in the appeals by the State of Texas, appellant, from certain orders entered by this Court in this cause on the 30th day of May, 1936, and the transcript and record of the proceedings therein can be used and will serve as the bill of exceptions and transcript of the record and proceedings on this appeal;

It is Ordered that such bill of exceptions and such transcript of the record and proceedings be sent up as the bill of exceptions and transcript of the record and proceedings on this appeal and that the appeal of this Appellant be heard upon the same record, and the Clerk is authorized and directed to include in said transcript of the record such additional papers and orders as the Appellant in this appeal may desire.

James C. Wilson, United States District Judge.

[fol. 145] IN UNITED STATES DISTRICT COURT

TRUSTEE'S ASSIGNMENT OF ERRORS—Filed June 29, 1936

Comes now David Donoghue, Trustee herein, and says that the Court did on the 30th day of May, 1936, enter the following order:

"On the 30th day of March, 1936, came on for hearing the motion of the State of Texas, acting by and through William McCraw, its Attorney General, praying that all of the injunctive processes issuing out of this Court restraining the officers of the State of Texas from prosecuting certain suits in the Courts of the State of Texas seeking the recovery of taxes, fines and penalties and seeking the recovery of penalties from the Debtor herein and others, be in all things set aside and dissolved; and after hearing said motion and the evidence and arguments thereon, the Court finds that the same should be granted.

It is, therefore, ordered, adjudged and decreed that all injunctions heretofore issued in this cause against the State of Texas and its officers and administrative agencies, restraining and enjoining them from prosecuting causes No. 56252 pending in the 126th Judicial District Court of Travis County, Texas, styled The State of Texas vs. V. E. Jackson, et al, and being a suit seeking the recovery of statutory penalties for alleged violations of the conservation laws of the State of Texas, and restraining the State of Texas, its officers and administrative agencies, from prosecuting cause No. 56476 pending in the 126th Judicial District Court of Travis County, Texas, Styled The State of Texas vs. V. E. Jackson, et al, seeking the [fol 146] recovery of taxes, fines and penalties, be and the same are hereby in all things set aside and dissolved.

Dated and entered this the 30th day of May, 1936.

James C. Wilson, United States District Judge."

That Cause No. 56476 referred to in said order is a suit by which the State of Texas seeks to establish the amount of taxes and interest thereon against the Debtor and others, and seeks to establish a lien asserted by the State to be a first and prior lien on the properties of the Debtor and others; and in entering said order the Court committed error, and the Trustee assigns the following as error:

1

The Court erred in entering the order aforesaid, because by said order the trial Court authorized and permitted the State Court to fix and determine the amount of taxes legally due the State of Texas, whereas the law requires that the Federal Court shall itself fix and determine the amount of taxes legally due.

2

The Court erred in entering said order authorizing and permitting the State to prosecute in the State Court a suit against the Debtor claiming a first and prior lien upon the property of the Debtor, because Section 77-b amendatory of the Bankrupcy Act of 1898, under which the Debtor had filed its petition for reorganization, vests the Federal Court with exclusive jurisdiction of the Debtor and all of its properties wherever situated, that there may be an orderly determination in the Federal Court of all matters and things affecting the Debtor and its estate; and the order [fol. 147] of the trial Court herein complained of prejudicially interferes with and hinders such orderly determination.

3

The Court erred in entering said order, because pending the time of the final determination in the state trial and appellate Courts of the State's suit and claim for taxes, the plan of reorganization of the Debtor is prejudicially interfered with and delayed and the proceeding in reorganization is prolonged.

4

The Court erred in entering said order, because the plan of reorganization submitted by the Debtor herein proposed an early determination of the claims against the Debtor and their orderly liquidation, and said order of the Court permitting the State to determine in the State Court the amount of its tax claim, without any limitation upon it as to when its claim shall be fixed in the Federal Court with the other claimants therein, disrupts the plan of reorganization submitted by the Debtor.

5

The Court erred in entering said order and permitting the State to litigate its suit and claim for taxes in the

State Court, because pending the final determination of said suit in the state trial and appellate Courts no payments under the plan of reorganization can be made to creditors.

W. B. Harrell, Attorney for David Donoghue, Trustee, Appellant.

[fol. 148] IN UNITED STATES DISTRICT COURT

WAIVER OF ISSUANCE AND SERVICE OF CITATION ON APPEAL—Filed July 3, 1936

The undersigned attorneys of record for the State of Texas acknowledge receipt of a copy of the petition of David Donoghue, Trustee, for appeal to the United States Circuit Court of Appeals for the Fifth Circuit, complaining of an order of the United States District Court for the Northern District of Texas at Fort Worth, Texas, permitting the State of Texas to prosecute in the State Courts Cause No. 56476 pending in the District Court of the 126th Judicial District of Texas, styled The State of Texas vs. V. E. Jackson et al, and here now expressly waive the issuance and service of citation on appeal.

William McCraw, Attorney General of Texas. William C. Davis, Assistant Attorney General.

IN UNITED STATES DISTRICT COURT

TRUSTEE'S PRAECIPE—Filed June 30, 1936

To the Clerk of the United States District Court for the Northern District of Texas, Fort Worth Division:

In accordance with the order of the Honorable James C. Wilson, United States District Judge, you are requested by David Donoghue, Trustee in this cause, to send up as the transcript of the record in his appeal to the United [fol. 149] States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, the transcript of the record heretofore requested by the State of Texas for its appeal in this cause, and in addition to such transcript so made up for the State of Texas, to include therein for this appeal the following papers, documents and orders, which together

with the papers, documents and orders included in the transcript heretofore requested by the State of Texas, shall constitute the record on this appeal:

1. Petition of the Trustee for appeal, addressed to the District Court;
2. Petition of the Trustee for appeal, addressed to Circuit Court of Appeals for the Fifth Circuit;
3. Order of the District Court on the petition for appeal;
4. The Trustee's assignment of errors;
5. Waiver of notice of appeal and citation on appeal;
6. This præcipe.

W. B. Harrell, Attorney for David Donoghue, Trustee, Appellant.

[fol. 150] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 151] IN UNITED STATES DISTRICT COURT

[Title omitted]

MOTION AND ORDER TO SEND UP ORIGINAL MOTION—Filed June 27, 1936

U. S. Circuit Court of Appeals, Filed Aug. 15, 1936. Oakley F. Dodd, Clerk. 8189

To said Honorable Court:

Comes now the State of Texas, through its Attorney General, in the above entitled and numbered cause, and respectfully moves the Court to enter its order directing the Clerk of this Court to send up on the appeal in this cause to the United States Circuit Court of Appeals, Fifth Circuit, New Orleans, the original amended motion filed by the State of Texas in this cause, through its Attorney General, seeking the confiscation of certain oil in the possession of David Donoghue, Trustee in Bankruptcy in the Corporate Reorganization Proceedings under Section 77b, and being the property of Trinity Refining Company, a corporation, Debtor, and for grounds and reasons for not including said original amended motion in the printed transcript on ap-

peal, the State represents that although the motion itself is not lengthy, the Exhibits attached thereto consist of various and sundry rules, regulations and orders of the Railroad Commission, promulgated from time to time, and that [fol. 152] the same are very lengthy, written in small type, and if attempted to be incorporated in the printed transcript of this cause on appeal, the printed transcript will be voluminous and will result in great expense to the parties litigant in having same incorporated in the printed transcript.

Wherefore, it is prayed that this Court enter its order directing the Clerk of this Court to transmit to the Clerk of the Circuit Court of Appeals, Fifth Circuit, New Orleans, the original amended motion filed by the State in this proceeding, so that the same may accompany the other papers on appeal, to the Circuit Court of Appeals.

William McCraw, Attorney General of Texas; W. J. Holt, Joe Sharp, C. M. Kennedy, William C. Davis, Assistants Attorney General, Attorneys for the State of Texas.

ORDER OF THE COURT

The above motion having been duly presented and it appearing that it is necessary and proper that the original amended motion filed by the State of Texas in this cause, which cannot be reproduced and incorporated in the printed transcript, should be inspected by the United States Circuit Court of Appeals, Fifth Circuit, New Orleans, upon the hearing of this appeal, it is therefore Ordered that said above mentioned original amended motion be certified by the Clerk of this Court and be transmitted to the Clerk of [fol. 153] the United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, to be considered along with the transcript of the record upon the hearing of this appeal.

James C. Wilson, United States District Judge.

Dated: This the 26 day of June, 1936.

I hereby certify that the foregoing is a true copy of the original thereof now in my office. Attest: July 23, 1936.

Geo. W. Parker, Clerk, by Rive J. McGrew, Deputy.

(Seal.)

[fol. 154] That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of November 10, 1936

No. 8189

THE STATE OF TEXAS et al.,

versus

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING CO., Debtor,

(And Reverse Title)

On this day this cause was called, and, after argument by Joe Sharp, Esq., Assistant Attorney General of Texas, and William C. Davis, Esq., Assistant Attorney General of Texas, for appellants, and W. B. Harrell, Esq., for appellee, was submitted to the Court.

[fol. 155] OPINION OF THE COURT AND OPINION OF HUTCHESON, CIRCUIT JUDGE, CONCURRING IN PART AND DISSENTING IN PART—Filed February 15, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8189

THE STATE OF TEXAS et al., Appellants and Appellee,

versus

DAVID DONOGHUE, Trustee of Trinity Refining Company, Debtor, Appellee and Appellants

(And Reverse Title)

Appeals from the District Court of the United States for the Northern District of Texas

(February 15, 1937)

Before Hutcheson and Holmes, Circuit Judges, and Strum, District Judge

HOLMES, Circuit Judge:

These are appeals and a cross appeal from orders of the district court made in a corporate reorganization proceeding

under Section 77B of the Bankruptcy Act (11 U. S. C. A. 207). The principal order complained of denied a motion of state court receivers for repossession of property of the debtor which had been taken from them by the trustee in bankruptcy. Other orders directly appealed from are with reference to the right of the State of Texas to proceed with [fol. 156] suits in its own courts against the debtor to recover taxes, fines, penalties, and forfeitures. One of the orders entered by the court below at the same hearing was adverse to the trustee, and from it he has prosecuted a cross appeal. It dissolved injunctions, issued on the original reorganization hearing, which restrained the prosecution of tax and penalty suits in the state courts.

The relevant facts disclose that two suits were instituted in the state courts of Texas against the debtor within four months before the filing by the latter of its petition for reorganization in the bankruptcy court. In the first, the Attorney General of Texas sought the recovery of fines, penalties, and forfeitures incurred by numerous alleged violations of the oil conservation laws of the state (Art. 6036, R. S. Texas, Acts 44 Legislature, p. 180, ch. 76, Sec. 12, Acts 1935). He also asserted a statutory lien, under Art 1373 of the Revised Statutes of Texas, upon all of the property of the debtor to enforce the payment of the amounts claimed. In accordance with the prayer of the petition, the court appointed receivers who took charge of the property in controversy for the purpose of securing the payment of the alleged fines, penalties, and interest.

In the second case, the Attorney General was suing to recover delinquent taxes alleged to have been incurred by the defendants in the production, refining, blending, and sale of motor fuel within the State of Texas; also penalties and interest alleged to have accrued by reason of such activities. A statutory lien was asserted and the appointment of receivers prayed for; but the court declined to appoint receivers for the reason, as assigned by it, that the property was then in the possession of receivers appointed by another court in the above mentioned first suit.

On December 18, 1935, the debtor, Trinity Refining Company, a corporation, and one of the defendants in each of [fol. 157] the above mentioned suits, filed its aforesaid petition in the United States District Court for Northern Texas. The district judge found that said petition was filed in good

faith, and approved the same as properly filed. At the same time, the debtor filed a plan of reorganization. The court appointed a trustee who qualified and demanded of and received from the receivers in the first suit such properties as had been taken possession of by them.

Thereafter, January 8, 1936, on motion of the Attorney General, the state court in which the suit for taxes was pending, and wherein the appointment of receivers had been denied, transferred said suit into the district court in which the penalty suit was pending, and on the same day the latter court entered in the tax suit an order appointing the same persons receivers of the debtor's property as previously had been appointed receivers in the penalty suit, reciting in the order that the bond theretofore executed by them as receivers in the first case was sufficient to stand as their bond in the second. Appellants claim that, since the latter suit seeking to foreclose a statutory lien was filed four days before the petition for reorganization was approved, the state court drew into its custody the property of the debtor to the exclusion of all other courts, notwithstanding the refusal to appoint receivers when the court was first requested so to do.

Although the defendants are exactly the same in each case, there was no effort toward consolidation prior to bankruptcy, and the two suits must be deemed separate and distinct in determining jurisdictional issues between the state court receivers and the trustee in bankruptcy.

In reorganization proceedings under Sec. 77B, the bankruptcy courts have exclusive jurisdiction of estates of debtors, except where the property is in the custody of another court as an incident to the enforcement of a valid lien not [fol. 158] obtained through judicial proceedings within four months prior to approval of the petition. Duparquet v. Evans, 297 U. S. 216; Henderson v. Mayer, 225 U. S. 631; Straton v. New, 283 U. S. 318; Bryan v. Speakman, 53 Fed. (2) 463; In re White Star Refining Co., 74 Fed. (2) 269. The jurisdiction and powers of the court, the rights and liabilities of creditors, and of all persons with respect to the debtor and its property, are the same as if a voluntary petition in bankruptcy had been filed and a decree of adjudication entered when the petition for reorganization was approved. 77B(o). Also, in addition to the provisions of Sec. 29, U. S. C. A., Title 11, the judge may enjoin or stay the com-

mencement or continuation of suits against the debtor until after final decree; and may, upon notice and for cause shown, enjoin or stay the commencement or continuance of any judicial proceeding to enforce any lien upon the estate until after final decree. 77B(c) (10), 11 U. S. C. A. 207(c)(10).

In the first suit, the lien relied upon by appellants came into existence through legal proceedings. It was the filing of the suit which created the lien. The statute provides that the State shall have a lien "from the date that suit shall be instituted," and that the instituion of such suit "shall constitute notice of such lien" (Art. 1373, supra). Having been obtained through legal proceedings within four months prior to the filing of the petition, it must be deemed null and void under Sec. 67f of the Bankruptcy Act (11 U. S. C. A. 107f); and the property affected by such lien shall be deemed wholly discharged and shall pass to the trustee as part of the estate of the bankrupt. In re Obergfoll, 239 Fed. 850; Globe Bank v. Martin, 236 U. S. 288, 59 L. Ed. 583; In re Diamond's Estate, 259 Fed. 70; In re Greyling Realty Corporation, 74 Fed. (2) 734, Certiorari denied, 294 U. S. 725; Moore v. Garaguez, 83 Fed. (2) 139.

Aside from the lien, the State contends that it should be permitted to proceed to confiscate alleged illegal oil under [fol. 159] the provisions of the Texas Confiscation Act. Unlawful oil is defined by par. d of Sec. 1 of Art. 6066(a) of the Revised Statutes of Texas as "oil which has been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the Commission, and oil which has been produced within the State in violation of any law of said state or in violation of any order of the Commission, and shall include any oil transported in violation of any such law or in violation of any such order."

The Confiscation Act declares such oil a nuisance and directs that it shall be forfeited to the State as thereinafter provided. It sets out the court procedure necessary to obtain a judgment of forfeiture and of authorization of seizure and sale of the products, as personal property is sold under execution. It provides further that the money realized from the sale of any such unlawful oil or products shall be applied, first, to the payment of the cost of suit and expenses incident to the sale of such products, after such expenses have been approved by the court, and that all funds then remaining shall be remitted forthwith to the

State Treasurer and shall be by the Treasurer placed to the credit of the General Revenue Fund of the State of Texas. The validity of this act is assailed as unconstitutional and void, but we deem it unnecessary to decide this contention. The oil was valuable property; it was not a nuisance per se; the title to it was in the debtor at the time the petition for reorganization was filed; and it passed to the trustee as part of the debtor's estate. It is now properly in the custody of the bankruptcy court.

In the second suit, which asserted a lien and sought a decree for gasoline taxes, the state court declined to appoint receivers until after the petition for reorganization was approved. When the belated appointment was made, the exclusive jurisdiction of the bankruptcy court had attached, and it was too late for the local tribunal to draw to itself [fol. 160] the res which was already in custodia legis. In Shields v. Coleman, 157 U. S. 168, 39 L. Ed. 660, it was held that, by vacating an order appointing a receiver, and discharging him, the court released its exclusive right to the custody of the property and left the way open for the jurisdiction of other courts to attach to it. We think an order declining to appoint a receiver in the first instance has the same effect, even though the reason for so doing was the existence of another state court receivership.

In the case before us, if the state court in the second suit, instead of declining to appoint a receiver prior to bankruptcy, had appointed a receiver and directed him to apply to the court in the first suit for possession of the property, when the first court should release it from custody, it would then probably have obtained priority over the bankruptcy proceeding, but, by declining to appoint a receiver, it released its claim to the custody of the property when the proceedings in the first suit were invalidated, and left the way open for the jurisdiction of the bankruptcy court to attach to it. There was no reason why the court in the second suit could not appoint a receiver who would have stood ready to take possession of the property when the first court's jurisdiction was released. Pennsylvania Company v. Pennsylvania, 294 U. S. 189. In the just cited case, after stating that, where the judgment sought is strictly in personam, suits may proceed at the same time in both state and federal courts having jurisdiction, but that, if the two suits are in rem or quasi in rem, requiring that the court

or its officer have possession or control of the property which is the subject of the suit, it is stated that "the jurisdiction of one court must of necessity yield to that of the other," and that the court first assuming jurisdiction over the property may maintain and exercise that jurisdiction to the exclusion of the other. Mr. Justice Stone then says:

[fol. 161] "Where the assertion of jurisdiction by the two courts is nearly simultaneous, it becomes important, as in the present case, to determine the precise time when the jurisdiction attaches. If the two suits do not have substantially the same purpose, and thus the jurisdiction of the two courts may not be said to be strictly concurrent, and if neither court can act effectively without acquiring possession and control of the property pendente lite, the time of acquiring actual possession may perhaps be the decisive factor. Compare Moran v. Sturges, supra, 284; Harkin v. Brundage, supra, 43. But when the two suits have substantially the same purpose and the jurisdiction of the courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of the bill is treated as in constructive possession of the property, and as authorized to proceed with the cause. Harkin v. Brundage, supra, 43, 45. Jurisdiction thus attaches upon the filing of the bill of complaint in court, at least where process subsequently issues in due course. Palmer v. Texas, supra, 129; Farmers' Loan & Trust Co. v. Lake Street Elevated R. Co., supra, 60; compare Smith Purifier Co. v. McGroarty, 136 U. S. 237, 240. The confusion and uncertainty are thus avoided which might otherwise result from the attempt to resolve the troublesome question of what constitutes actual possession and to determine priority of service of process in the two suits."

By declining to appoint any receiver or to issue any other process to take charge of the property, the state court's jurisdiction in the second suit did not attach upon the filing of the bill because it was not a case "where process subsequently issued in due course." We find no error in the orders assailed by the appellants, and they are affirmed.

[fol. 162] As to the cross appeal by the trustee, it is contended that the court erred in dissolving injunctions restraining prosecutions in the state courts of said suits against the debtor and others for penalties and for gasoline taxes, wherein the State claimed liens to secure the payment

thereof upon the property of the debtor which was in the custody of the trustee. The argument is that such suits would necessarily interfere with full jurisdiction over the res by the bankruptcy court; that, having taken possession of the property of the debtor, it was the duty of the trustee to pay all taxes due by it (City of Dallas v. Menezes, 16 Fed. (2) 779; In re Florence Commercial Co., 19 Fed. (2) 468; Van Huffel v. Harkelrode, 284 U. S. 225, 52 Sup. Ct. 115, 76 L. Ed. 256, 78 A. L. R. 453); that the bankruptcy court has the power to determine the amount and validity of all such claims against the debtor; and that its jurisdiction is superior to that of the state court which was not foreclosing any lien on property within its control when the reorganization petition was approved, as well as of the state court wherein the lien was obtained by filing suit.

It may be that the orderly administration of the reorganization proceedings would be subserved by the bankruptcy court exercising its powers in adjudicating the amount due for taxes, the legality or illegality of the claims for fines and penalties, the matter of forfeitures, and the validity or invalidity of the alleged liens upon property in the possession of the trustee in bankruptcy, but that was a matter for the determination of the district judge in his discretion. Having first issued the temporary injunction, he later saw fit to dissolve it, and we cannot say that there was an abuse of discretion in so doing. Smith v. Vulcan Iron Works, 165 U. S. 518; Meccano, Ltd. v. Wanamaker, 253 U. S. 136, Cf. United Fuel Gas Co. v. Public Service Comm., 278 U. S. 322; Alabama v. United States, 279 U. S. [fol. 163] 229; Ohio Oil Co. v. Conway, 279 U. S. 813. Also cf. Rule 12, 286 U. S. 602, 603.

Both on direct and cross appeal, the case is Affirmed.

HUTCHESON, Circuit Judge, concurring in part and dissenting in part:

Except as it affirms the denial of the State's petition to be allowed to proceed in condemnation against the alleged "unlawful oil," I concur in the general result of the decision. I agree, too, with the general statement on pages 3 and 4 of the opinion, as to the jurisdiction of the bankruptcy court in reorganization proceedings, and in all that is said with regard to the first suit. I do not agree with, but respectfully dissent from, what is said, on pages 5, 6, and 7

of the opinion, as to the effect on the second suit of the filing of the debtor's petition for reorganization. The authorities the opinion cites lead, I think, to a conclusion exactly the opposite of that the opinion announces, that because the court declined to appoint receivers it did not acquire jurisdiction over the property. They make it clear, I think, that in case of suits to foreclose a lien, valid as well after as before the institution of bankruptcy proceedings, "jurisdiction attaches upon the filing of the bill of complaint in court, at least where process subsequently issues on a bill in due course." Penn. Co. v. Pennsylvania, 294 U. S. 189; Harkin v. Brundage, 276 U. S. 43-5; Metcalf v. Barker, 187 U. S. 165; Palmer v. Texas Co., 212 Tex. 118; Farmers Loan [fol. 164] & Trust Co. v. Lake Street, 177 U. S. 51. In this case process issued in due course.[1] The majority opinion is, therefore, in error in stating that this is not a case where process subsequently issued in due course. The error of the majority arises, I think, from the mistaken view that the appointment of a receiver, or other process of seizure, is necessary to give jurisdiction. White Star Refining Co., 74 Fed. (2) 269, cited by the majority, announces, and the announcement is supported by uniform authority, "that the foreclosure of a lien not invalidated by bankruptcy on specific property, *undertaken in a state court with or without receivership is unaffected by the subsequent filing of a bankruptcy petition against the owner of the property, and that the bankruptcy court as to that property has not paramount jurisdiction but only concurrent jurisdiction and must observe due comity is now well settled.*" (Italics mine).

Notwithstanding my difference with the majority in these respects, I believe the decision of affirmance, except as to the condemnation proceeding, was right, for the property not having been taken into the actual physical possession of the court through its receivers (Cf. Moran v. Sturges, 154 U. S. 256), the jurisdiction of the state and federal courts as to the determination of liens upon or claims against the property was concurrent up to the point of its seizure for the purpose of satisfaction of those claims. Fred Ley &

NOTE. 1. Finding of fact of the trial court VIII. "Citation and notice were duly issued in the cause, and service thereon was had."

Company v. Wheat, 64 Fed. (2) 257. If then, the jurisdiction and power of the court in reorganization proceedings were no greater than it is in ordinary bankruptcies, its action in taking the property over would have been error. But, under Section 77B(c)(10) (11 U. S. C. A. 207(c)(10) the Reorganization Court has power to enjoin or stay lien suits until after final decree, and whether the state court had actual possession of the property, or not, could have stayed all proceedings in the suit. Its action therefore in taking [fol. 165] charge of the property, and holding it to preserve the status while permitting the state suits to go on, was, I think, no violation of comity but the exercise of a sound administrative discretion in recognition of it. In this way the court prevented the dissipation of the property during pendency of the reorganization proceedings, while permitting the state to proceed in its own courts in the enforcement of its own laws against a company which on the pleadings, the only record we have, appears to have been an egregiously willful tax evader and violator of those laws. Bankruptcy does not of itself destroy the jurisdiction of state courts. It is competent for the court of bankruptcy to permit administration to go on in them. Ex Parte Baldwin, 291 U. S. 610; Connell v. Walker, 291 U. S. 1. It is usual and proper for federal courts to defer to prior state court proceedings to the extent of relinquishing jurisdiction to them, especially where the suits, like those dealt with in this proceeding, are brought by a state in respect of its fiscal affairs. Pennsylvania v. Williams, 294 U. S. 176; Penn. Co. v. Pennsylvania, 294 U. S. 189. The suits brought here are not only in the interest of preventing tax evasion, but, if successful, would establish the complete insolvency and inability of the debtor to reorganize. Their prosecution should not be drawn into the bankruptcy court, but should be left in the state courts. Re Sentinel Oil Co., 12 Fed. Supp. 294; Re Missouri Gas & Electric Co., 11 Fed. Supp. 434. To the condemnation proceeding which the state sought permission to bring, these observations apply with peculiar force. If the oil is "unlawful oil," and subject to condemnation, certainly by taking bankruptcy or by proceeding in reorganization, a willful violator may not change it into lawful oil. If the state was entitled to condemn it before the petition was filed, it was equally so entitled after it was filed. The proceeding to condemn is a special one; it must be followed exactly as provided

for by the statute. U. S. v. Smelser, — F. (2) —; Mingus v. [fol. 166] Wadley, 285 S. W. 1084. The bankruptcy court sitting in reorganization is not competent to inquire into or adjudge the condemnation. The result of the court's order in refusing permission to proceed, if effective to prevent the State's first proceeding, would be that the reorganization would proceed on the assumption that the oil was the debtor's property only to have that assumption disappear if in a condemnation suit filed after reorganization judgment went for the state. For it is perfectly plain that a proceeding, in which the question of whether the property is to be forfeited may not be tried and decided, cannot affect that question. Though, therefore, I am of the opinion that the bankruptcy court was without power to prevent the State's first proceeding with its suit to condemn, and that the State may proceed without permission, for the suit is not one in rem, and does not require the court to have possession of the property until the judgment of condemnation is entered, I think the State did the seemly thing in applying for permission, and that permission should have been granted as matter of course. If the oil is condemned while the property is still in the custody of the reorganization court, certainly that court can be depended upon in the exercise of the comity due between courts to surrender it on the State's writ for sale as the statute requires. I therefore dissent from the judgment of affirmance as to the condemnation proceeding.

[fol. 167] JUDGMENT

Extract from the Minutes of February 15, 1937

No. 8189

THE STATE OF TEXAS et al.,

versus

DAVID DONOGHUE, Trustee of Trinity Refining Co., Debtor

(And Reverse Title)

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the orders of the said District Court appealed from in this cause be, and the same are hereby, affirmed on both the direct and cross-appeal;

It is further ordered, adjudged and decreed that the appellants, The State of Texas, and others, and the surety on the appeal bond herein, The Ætna Casualty and Surety Company, be condemned in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

"Hutcheson, Circuit Judge, concurring in part and dissenting in part."

[fol. 175] ORDER DENYING REHEARING

Extract from the Minutes of March 5th, 1937

No. 8189

THE STATE OF TEXAS et al.,

versus

DAVID DONOGHUE, Trustee of Trinity Refining Co., Debtor

(And Reverse Title)

As neither of the judges who concurred in the judgment of the court in the above numbered and entitled cause is of opinion that the petition for rehearing should be granted, it is ordered that the said petition be, and the same hereby is Denied.

[fol. 176] MOTION AND ORDER STAYING MANDATE—Filed March 19, 1937

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 8189

THE STATE OF TEXAS et al., Appellants and Appellee,

vs.

DAVID DONOGHUE, Trustee of Trinity Refining Company, Debtor, Appellee and Appellants

To the Honorable Court Aforesaid:

Come now the appellants and appellee in the above entitled and numbered cause, and would show to the Court that they will immediately, and as soon as the Clerk of this Court can prepare a transcript of the proceedings in this cause, apply to the Supreme Court of the United States for a writ of certiorari to review the judgment rendered herein by this Honorable Court wherein it affirmed the judgment of the District Court of the United States for the Northern District of Texas on the direct appeal and upon

the cross appeal. Appellants and appellee would further show to the Court, that they believe that, if the mandate of this Court affirming the direct appeal by appellants and appellee is not stayed, the appellee and appellants, David [fol. 177] Donoghue, Trustee of Trinity Refining Company, Debtor, will immediately attempt to dispose of the properties and assets of the Trinity Refining Company, Debtor, with a view to satisfying the claims of various creditors now on file with the Trustee in Bankruptcy under Section 77-B, either in the reorganization proceedings as it now exists or under liquidation as provided for in Section 77-B of the Bankruptcy Act, in which event the controversy existing at this time, and which appellants and appellee will attempt to have passed upon by the Supreme Court of the United States pursuant to their petition for writ of certiorari, will become moot pending such consideration by the Supreme Court of the United States.

Wherefore, because of the premises, appellants and appellee pray that this Honorable Court stay its mandate for such time as will enable the appellants and appellee to apply to the Supreme Court of the United States for a writ of Certiorari to review the judgment of this Court; and, if appellants and appellee file such application with the Clerk of said Court within such time, then that said mandate be stayed until this cause be determined by said Court.

Respectfully submitted, William McGraw, Attorney General of Texas; William C. Davis, Assistant Attorney General, Attorneys for Appellants and Appellee.

[fol. 178] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 8189

THE STATE OF TEXAS et al., Appellants and Appellee,

versus

DAVID DONOGHUE, Trustee of Trinity Refining Co., Debtor, Appellee and Appellants

(And Reverse Title)

On Consideration of the Application of the Appellants and Appellee in the above numbered and entitled cause for

a stay of the mandate of this court therein, to enable them to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 19th day of March, 1937.

(Signed) E. R. Holmes, United States Circuit Judge.

[fol. 179] CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 154 to 178 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 8189, wherein The State of Texas, et al., are appellants and appellee, and David Donoghue, Trustee of Trinity Refining Co., debtor, is appellee and appellants, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 153 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 19th day of March A. D. 1937.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal United States Circuit Court of Appeals, Fifth Circuit.)

[fol. 180] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 3, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted, limited to the questions raised upon the application of the State for permission to take proceedings for the confiscation of the alleged illegal oil.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: Enter William McCraw. File No. 41,430. U. S. Circuit Court of Appeals, Fifth Circuit. Term No. 28. State of Texas and J. C. Clopton and Bullock Hyder, Receivers, etc., petitioners, vs. David Donoghue, Trustee of Trinity Refining Company, Debtor. Petition for a writ of certiorari and exhibit thereto. Filed April 13, 1937. Term No. 28, O. T., 1937.

FILE COPY

Office - Supreme Court, U. S
FILED
APR 13 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 28

STATE OF TEXAS AND J. C. CLOPTON & BULLOCK HYDER, RECEIVERS,

Petitioners.

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILLIAM MCCRAW,
Attorney General of Texas;
W. J. HOLT,
WILLIAM C. DAVIS,
C. M. KENNEDY,
JOE SHARP,
PAT M. NEFF, JR.,
Assistant Attorneys General;
BEN GREENWOOD,
Counsel for Petitioners.

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3. The Circuit Court of Appeals erred in holding that the oil originally held by the State Court receivers and which was in the hands of the Bankruptcy Trustee at the time of the filing of the State's motion seeking permission to confiscate (subject to the jurisdictional pleas) was valuable property and rightfully in the hands of the bankruptcy trustee and in denying the right of the State of Texas to institute confiscation proceedings against same in a State Court 24

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 890

STATE OF TEXAS AND J. C. CLOPTON & BULLOCK HYDER, RECEIVERS,
Petitioners and Appellants and Appellee Below,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR,
Respondent and Appellee and Appellants Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The petition of the State of Texas and J. C. Clopton and Bullock Hyder respectfully shows to this Honorable Court:

Statement of the Case.

The State of Texas instituted two suits in two of its own courts against respondent and others. The first suit sought the recovery of fines and penalties imposed upon specifically named violators of its oil conservation statutes (R. 118), for foreclosure of a statutory lien and the appointment of

receivers in aid of such foreclosure (R. 119), the lien statute invoked providing that the State shall have a lien "from the date that suit shall be instituted", and that the institution of such suit "shall constitute notice of such lien." Article 1372, Revised Statutes of Texas, under the same title and chapter, (Title 32, Ch. 6, Revised Statutes of Texas) which creates a lien, provides that "whenever any domestic or foreign corporation in this State shall violate any law of this State, * * * for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within this State at the time of such violation, or which may thereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties and for cost of suit and cost of collection." (See Appendix A.)

The second suit against respondent and others sought the recovery of taxes and penalties fixed by statute and which had accrued and were delinquent as a result of respondent's refining, processing, blending and sale of motor fuel, also for the foreclosure of a statutory lien securing such taxes and the appointment of receivers in aid of such lien foreclosure (R. 120). (For Taxing Act see Appendix B.)

The first suit on behalf of the State was filed October 12, 1935. Citation and notice were issued in due course directing respondent to appear on October 19, 1935, and show cause why receivers should not be appointed (R. 118-119). On the appearance day appointed, the respondent made default. On October 25, 1935, the State Court appointed receivers and directed them to take into their charge all of the properties of respondent. On October 20th, the receivers qualified and actually took charge of respondent's properties (R. 119-120).[1]

The second suit by the State seeking the recovery of motor fuel taxes amounting to $104,084.97 and by later amend-

[1] (See Findings of Fact of Trial Court I, II, III, IV and V, R. 118-120.)

ment increased to over $300,000.00, was filed December 14, 1935, in another State Court, naming respondent and others as parties defendant. The State in this suit sought the foreclosure of a statutory lien, and prayed for appointment of receivers in aid of the lien foreclosure. The district judge declined to appoint receivers in this suit because receivers appointed in the State's first suit were in possession of the properties of respondent. However, citation and notice were issued in due course and service thereon was had (R. 120-121).[2]

On January 8, 1936, the tax suit (the State's second suit) was transferred by the State to the court wherein the penalty suit (the State's first suit) was pending, and on the same day the receivers appointed in the first suit were appointed and qualified in the second suit.

December 18, 1935, respondent filed in the District Court for the Northern District of Texas his petition for corporate reorganization under Section 77-B of the Bankruptcy Act as amended (11 U. S. C. A. 207). The District Judge found that the petition was filed in good faith and approved the same as properly filed. At the same time respondent (debtor) filed a plan of reorganization. The Court appointed a Trustee who qualified and demanded of and received from the State Court receivers such properties as had been taken possession of by them. This was done on December 19, 1935 (R. 121-122). January 13, 1936, petitioners filed pleas to the jurisdiction of the Bankruptcy Court, and subject to such pleas alleged that the petition for reorganization was not filed in good faith, setting forth grounds demonstrating that the plan as proposed was not feasible, and that the petition should be dismissed. The court overruled the pleas and motion.[3]

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[2] (See Findings of Fact of Trial Court VI, VII, and VIII, R. 120-121.)

[3] Other proceedings were had which are not material here.

Later, since the State Court pursuant to the suits filed by the State had appointed receivers to aid the lien foreclosure and the jurisdiction of the res was in the State Court before the filing of the petition for reorganization under Section 77-B, the State Court, upon motion of receivers, entered its order directing them to go into the Bankruptcy Court and petition it for a return of respondent's properties previously held by them, and also to relate to the Bankruptcy Court that this action was to avoid unseemly conflicts between two courts of coordinate jurisdiction. This plea to the jurisdiction, after the court had entertained it and heard argument thereon, was denied.

Simultaneously with the filing of this jurisdictional plea and subject thereto, the State through its Attorney General asked leave of the Bankruptcy Court to institute confiscation proceedings in one of its own courts, alleging that the oil located upon respondent's refinery site, and which was previously held by the State Court receivers, was illegal as defined by the Texas Statutes, and consequently was subject to confiscation as provided by statute (R. 126). The court denied this motion. Exception was duly taken. Petition for appeal and an assignment of errors was filed, the petition for appeal was allowed, and the appeal was duly perfected to the Circuit Court of Appeals for the Fifth Circuit (R. 6-7). (For Confiscation Act see Appendix C.)

Respecting the questions presented upon the appeal, the Circuit Court as to the first suit said:

> "In the first suit, the lien relied upon by appellants came into existence through legal proceedings. It was the filing of the suit which created the lien. The statute provides that the State shall have a lien 'from the date that suit shall be instituted,' and that the institution of such suit 'shall constitute notice of such lien' (Art. 1373, *supra*). Having been obtained through legal proceedings within four months prior to the filing of the petition, it must be deemed null and void under

Sec. 67f of the Bankruptcy Act (11 U. S. C. A. 107f); and the property affected by such lien shall be deemed wholly discharged and shall pass to the trustee as part of the estate of the bankrupt. In re Obergfoll, 239 Fed. 850; Globe Bank *v.* Martin, 236 U. S. 288, 59 L. Ed. 583; In re Diamond's Estate, 259 Fed. 70; In re Greyling Realty Corporation, 74 Fed. (2) 734 Certiorari denied, 294 U. S. 725; Moore *v.* Garaguez, 83 Fed. (2) 139." (R. 157.)

Regarding the second suit the Circuit Court held:

"In the case before us, if the state court in the second suit, instead of declining to appoint a receiver prior to bankruptcy, had appointed a receiver and directed him to apply to the court in the first suit for possession of the property, when the first court should release it from custody, it would then probably have obtained priority over the bankruptcy proceeding, but, by declining to appoint a receiver, it released its claim to the custody of the property when the proceedings in the first suit were invalidated, and left the way open for the jurisdiction of the bankruptcy court to attach to it. * * *" (R. 158.)

"By declining to appoint any receiver or to issue any other process to take charge of the property, the state court's jurisdiction in the second suit did not attach upon the filing of the bill because it was not a case 'where process subsequently issued in due course.' We find no error in the orders assailed by the appellants, and they are affirmed." (R. 159.)

the majority holding that, since the court in the second suit declined to appoint receivers, process did not issue in due course, notwithstanding the fact that the record discloses that "citation and notice were duly issued * * * and service thereon was had."[4]

Respecting the State's right to confiscate the illegal oil in one of its own tribunals, the Circuit Court held:

[4] (See Findings of Fact of Trial Court VIII, R. 121.)

"Aside from the lien, the State contends that it should be permitted to proceed to confiscate alleged illegal oil under the provisions of the Texas Confiscation Act. Unlawful oil is defined by par. d of Sec. 1 of Art. 6066(a) of the Revised Statutes of Texas as 'oil which has been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the Commission, and oil which has been produced within the State in violation of any law of said state or in violation of any order of the Commission, and shall include any oil transported in violation of any such law or in violation of any such order.'

"The Confiscation Act declares such oil a nuisance and directs that it shall be forfeited to the State as thereinafter provided. It sets out the court procedure necessary to obtain a judgment of forfeiture and of authorization of seizure and sale of the products, as personal property is sold under execution. It provides further that the money realized from the sale of any such unlawful oil or products shall be applied, first, to the payment of the cost of suit and expenses incident to the sale of such products, after such expenses have been approved by the court, and that all funds then remaining shall be remitted forthwith to the State Treasurer and shall be by the Treasurer placed to the credit of the General Revenue Fund of the State of Texas. The validity of this act is assailed as unconstitutional and void, but we deem it unnecessary to decide this contention. The oil was valuable property; it was not a nuisance per se; the title to it was in the debtor at the time the petition for reorganization was filed; and it passed to the trustee as part of the debtor's estate. It is now properly in the custody of the bankruptcy court." (R. 157-158.)

The motions of the State to have dissolved the injunctions issued restraining the prosecution of the State's two suits were granted (R. 124),[5] the respondent and the bankruptcy

[5] (See Findings of Fact of Trial Court XIV, R. 124.)

trustee excepted and prosecuted cross appeals to the Circuit Court. That court affirmed these orders (R. 160).

The presiding Judge (Hutcheson) dissented from the majority opinion concerning what was said in *Pennsylvania Company* v. *Pennsylvania,* 294 U. S. 189, as to the question of whether process was issued in due course in the State's second suit so as to place exclusive jurisdiction of respondent's (debtor) properties in the State Court, thereby rendering the Bankruptcy Court under Section 77-B without jurisdiction or authority to dispossess the State Court receivers of the properties of respondent. The dissenting judge in regard to this question said:

> "The authorities the opinion cites lead, I think, to a conclusion exactly the opposite of that the opinion announces, that because the court declined to appoint receivers it did not acquire jurisdiction over the property. They make it clear, I think, that in case of suits to foreclose a lien, valid as well after as before the institution of bankruptcy proceedings, 'jurisdiction attaches upon the filing of the bill of complaint in court, at least where process subsequently issues on a bill in due course.' Penn. Co. *v.* Pennsylvania, 294 U. S. 189; Harkin *v.* Brundage, 276 U. S. 43-5; Metcalf *v.* Barker, 187 U. S. 165; Palmer *v.* Texas Co., 212 Tex. 118; Farmers Loan & Trust Co. *v.* Lake Street, 177 U. S. 51. In this case process issued in due course. The majority opinion is, therefore, in error in stating that this is not a case where process subsequently issued in due course. The error of the majority arises, I think, from the mistaken view that the appointment of a receiver, or other process of seizure, is necessary to give jurisdiction. White Star Refining Co., 74 Fed. (2) 269, cited by the majority, announces, and the announcement is supported by uniform authority, 'that the foreclosure of a lien not invalidated by bankruptcy on specific property *undertaken in a state court with or without receivership is unaffected by the subsequent filing of a bankruptcy petition against the owner of the prop-*

erty, and that the bankruptcy court as to that property has not paramount jurisdiction but only concurrent jurisdiction and must observe due comity is now well settled.' (Italics mine.)'' (R. 161.)

The dissenting judge also stated that the majority were in error in their holding that the State should be denied the right to proceed in confiscation in a State Court (R. 162-163).

Your petitioners filed a petition for rehearing (R. 165-171) and therein specified the errors committed by the Circuit Court in its opinion and judgment.

Reasons Relied on for Allowance of Writ.

1. The Circuit Court of Appeals has decided an important question of Bankruptcy Law under the provisions of Section 77-B of the Bankruptcy Act as amended (11 U. S. C. A., Section 207) which has not been, but should be, settled by this Court.

2. The Circuit Court of Appeals has sanctioned the exercise of jurisdiction of a Bankruptcy Court under the provisions of Section 77-B of the Bankruptcy Act as amended (11 U. S. C. A., Section 207) which was a departure from the usual course of judicial proceedings such as to call for an exercise of this Court's power of supervision.

3. The United States Circuit Court of Appeals has decided an important question of Federal law in a way in conflict with applicable decisions of this Court.

4. The United States Circuit Court of Appeals has erroneously held:

(a) That the lien of the State of Texas created by Article 1373 (See Appendix A) providing in part that the State shall have a lien ''from the date that suit shall be instituted'' and attaching to all property of any corporation

within the State of Texas at the time of the violation by such corporation of any law of the State and enacted for the purpose of securing the collection of penalties recovered by any judgment that may be rendered in favor of the State for the violation of State laws was a lien created by legal proceedings within four months prior to the filing of the petition for corporate reorganization under Section 77-B, and consequently was voided by Section 67-f of the Bankruptcy Act (11 U. S. C. A. 107-f). Such decision by the Circuit Court of Appeals is in conflict with the decision of this court in the case of *Henderson* v. *Mayer,* 225 U. S. 631.

(b) That the institution of the suit by the State of Texas to foreclose its statutory lien for taxes which was filed prior to the institution by the respondent (debtor) of proceedings in the Bankruptcy Court under Section 77-B and in which suit by the State of Texas citation had been duly issued and served upon respondent (debtor), but the State Court had refused to appoint a receiver upon the grounds that the same properties were in the possession of a receiver appointed by another State Court, there was no issuance of process in due course, and the filing of the suit did not confer upon the State Court exclusive jurisdiction over the properties of respondent (debtor) and the declining of the State Court to appoint receivers did not amount to the issuance of process in due course. The decision of the Circuit Court of Appeals is in conflict with the decisions of this court in *Farmers Loan & Trust Co.* v. *Lake Street Elvr. RR. Co.,* 177 U. S. 51, 61; *Peck* v. *Jenness,* 7 How. 612, 625; *Buck* v. *Colbath,* 3 Wall. 334, 341; *Wabash R. Co.* v. *Adelbert College,* 208 U. S. 38; *Palmer* v. *Texas,* 212 U. S. 118, 129; *Lion Bonding & Surety* v. *Karatz,* 262 U. S. 77, 89; *Harkin* v. *Brundage,* 276 U. S. 36, 43; *Penn. Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, 195; and *United States* v. *Bank of New York & T. Co.,* 296 U. S. 463, 481;

and *Straton* v. *New*, 283 U. S. 318, 322, 327. The decision of the Circuit Court of Appeals is also in conflict with two of its own decisions in the cases of *Bryan* v. *Speakman*, 53 F. (2d) 1463; and *Re White Star Refining Co.*, 74 F. (2d) 269.

5. The Circuit Court of Appeals has decided an important question of Federal law respecting the provisions of Section 77-B of the Bankruptcy Act (11 U. S. C. A., 207) wherein the rights of a sovereign state have come in conflict with the exercise of jurisdiction by a court of the United States pursuant to the provisions of Section 77-B.

6. The Circuit Court of Appeals in respect of its holdings set forth above has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

7. The question of the right of a Court of the United States exercising functions authorized by the provisions of Section 77-B of the Bankruptcy Act and its assumed power to dispossess State Court receivers previously appointed pursuant to the filing of a penalty suit against respondent (debtor) on behalf of a sovereign state to vindicate its public policy respecting the conservation of its natural resources should be settled by this court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Fifth Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be therein named a full and complete transcript of the record and proceedings in the case numbered and entitled on its docket No. 8189, State of Texas *et al.*, Appellants and Appellee, *vs.* David Donoghue, Trustee of Trinity Refining Company, Debtor, Appellee and

Appellants, and that the judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed in so far as it affirmed the judgment of the District Court against the State of Texas *et al.*, appellants and appellee, and that your petitioners may have such other and further relief in the premises as this Honorable Court may deem proper.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 890

STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDER, RECEIVERS,
Petitioners and Appellants and Appellee Below,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR,
Respondent and Appellee and Appellants Below.

BRIEF IN SUPPORT OF WRIT OF CERTIORARI.

I.

Opinions of the Courts Below.

The opinion of the United States Circuit Court of Appeals for the Fifth Circuit (R. 154) is reported in 88 F. (2d) 48. The findings of fact and conclusions of law of the District Court are found on pages 117-129 of the Record.

II.

Jurisdiction.

1. The opinion of the Circuit Court of Appeals for the Fifth Circuit is dated February 15, 1937 (R. 154). A peti-

tion for rehearing was seasonably filed March 3, 1937 (R. 165), and was denied on March 5, 1937 (R. 173); upon motion, stay of mandate was granted to expire within thirty days unless certificate of Clerk of this Court as to filing of petition, record and notice as required by Paragraph 3, Rule 38, of this Court has been filed with the Circuit Court Clerk.

2. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925 (U. S. C. A., Title 28, Section 347 (a) as interpreted in Rule 38, Subsection 5(b) of this Court).

3. The decision rendered by the Circuit Court of Appeals affirming the decree of the District Court denying relief to the State of Texas *et al.*, appellants and appellee in that court (petitioners here) in a proceeding in corporate reorganization under Section 77-B of the Bankruptcy Act as amended is in conflict with decisions of this Court holding that liens created by statutes but which are to be made effective by suit to foreclose within four months of the institution of the proceedings in bankruptcy are not liens created by judgments or such as have been obtained through legal proceedings. The present case is in conflict with *Henderson* v. *Mayer*, 225 U. S. 631.

4. The decision rendered by the Circuit Court of Appeals affirming the decree of the District Court denying relief to the State of Texas *et al.*, appellants and appellee (petitioners here) is in conflict with the decisions of this Court holding that where a State Court has entertained a suit seeking the foreclosure of a specific lien upon property given as security and where, citation and notice having issued in due course, and service of same having been procured upon the defendants in such suit, jurisdiction over the res set forth in the

State Court suit is in such State Court to the exclusion of all other courts. The present case is in conflict with the decisions of this Court in *Farmer's Loan & Trust Co.* v. *Lake Street Elvr. R. R. Co.*, 177 U. S. 51, 61; *Peck* v. *Jenness*, 7 How. 612, 625; *Buck* v. *Colbath*, 3 Wall. 334, 341; *Wabash R. Co.* v. *Adelbert College*, 208 U. S. 38; *Palmer* v. *Texas*, 212 U. S. 118, 129; *Lion Bonding & Surety Co.* v. *Karatz*, 262 U. S. 77, 89; *Harkin* v. *Brundage*, 276 U. S. 36, 43; *Penn. Casualty Co.* v. *Pennsylvania*, 294 U. S. 189, 195; *U. S.* v. *Bank of New York & T. Co.*, 296 U. S. 463, 481; *Straton* v. *New*, 283 U. S. 318, 332; and *Duparquet, Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216, 224.

5. The Circuit Court of Appeals has so far departed from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision because it has refused to follow the universal decisions of this Court and of the other Circuit Courts of Appeals holding that as between two courts of coordinate jurisdiction where a lien foreclosure suit in the State Court has been first filed and process having issued in due course, exclusive jurisdiction over the subject matter of the suit in the State Court is in such State Court and the Courts of the United States, whether sitting in bankruptcy or otherwise, will not interfere with the possession of the res by the State Court.

6. The Circuit Court of Appeals has decided a question of bankruptcy law under the provisions of Section 77-B of the Bankruptcy Act as amended against the right of the State of Texas pursuant to its own Constitution and Statutes to conserve its natural resources and to more effectively enforce its conservation laws in respect of the production and handling of crude petroleum oil and in rendering such decision has denied the right of the State of Texas to institute confiscation proceedings against illegally produced oil and to abate thoroughly the nuisance of

illegally produced oil by confiscating the same pursuant to Texas laws.

III.

Statement of the Case.

A full statement of the case has been given under the heading "Statement of the Case" in the petition which is hereby adopted and made a part of this brief.

IV

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the lien provided by Article 1373, Revised Statutes of Texas, which provides that in suits by the State of Texas against corporations seeking the recovery of penalties for violations of its laws the State shall have a lien "from the date that suit shall be instituted", is one created by judicial proceedings, and suit to foreclose same having been filed within four months prior to the filing of the petition under Section 77-B, such lien was, therefore, null and void under Section 67-f of the Bankruptcy Act (11 U. S. C. A. 107-f).

2. The Circuit Court of Appeals erred in holding that the State Court—in the suit by the State of Texas to recover delinquent taxes and to foreclose the statutory lien—in declining to appoint receivers lost jurisdiction over the property of respondent (debtor) upon the filing of the petition under Section 77-B notwithstanding the fact that citation and notice in the State's suit issued and service upon respondent (debtor) was had.

3. The Circuit Court of Appeals erred in holding that the oil originally held by the State Court receivers and which was in the hands of the Bankruptcy Trustee at the time of the filing of the State's motion seeking permission

to confiscate (subject to the jurisdictional pleas) was valuable property and rightfully in the hands of the bankruptcy trustee and in denying the right of the State of Texas to institute confiscation proceedings against same in a State Court.

V.

ARGUMENT.

1. The Circuit Court of Appeals erred in holding that the lien provided by Article 1373, Revised Statutes of Texas, which provides that in suits by the State of Texas against corporations seeking the recovery of penalties for violations of its laws the State shall have a lien "from the date that suit shall be instituted", is one created by judicial proceedings, and suit to foreclose same having been filed within four months prior to the filing of the petition under Section 77-B, such lien was, therefore, null and void under Section 67-f of the Bankruptcy Act (11 U. S. C. A. 107-f).

The State's suit for penalties (first suit) against respondent (debtor) was brought pursuant to Article 6036, Revised Civil Statutes as amended (see Appendix A) and was filed October 12, 1935 (R. 118), less than four months before the petition under 77-B was filed by debtor, which was on December 18, 1935 (R. 121). The State in this suit invoked the provisions of Articles 1372 and 1373. Those Acts are as follows:

> "Article 1372. (1193) Law violations.—Whenever any domestic or foreign corporation in this State shall violate any law of this State, including the law against trusts, monopolies and conspiracies or combinations or contracts in restraint of trade, for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within this State at the time

of such violation, or which may thereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties and for costs of suit and costs of collection. (Acts 1907, p. 175.)"

"Art. 1373. (1193) Lien, notice.—The State of Texas shall have a lien on all such property from the date that suit shall be instituted by the Attorney General or district or county attorney acting under his direction, in any court of competent jurisdiction within this State, for the purpose of forfeiting the charter or canceling the permit of such corporation, or for such fines or penalties. The institution of such suit for such fine, penalties or forfeiture, shall constitute notice of such lien. (Id.)"

The Circuit Court of Appeals decided that, inasmuch as Article 1373 provides that the State shall have a lien "from the date that suit shall be instituted" and that the institution of such suit "shall constitute notice of such lien", the same was obtained through legal proceedings, and consequently was voided by 67-f of the Bankruptcy Act (11 U. S. C. A. 107-f) upon the filing of debtor's petition under 77-B. Petitioners' contention is that the provisions of Article 1373 should be construed and given the same effect as the legislative act discussed and construed in *Henderson* v. *Mayer,* 225 U. S. 631, that is, the Texas act gives a right to a lien and is an inchoate lien.

We invite the Court to compare the two acts.

Georgia Code, Section 2795 in part declares:

"Landlords shall have a special lien for rent on crops made on land rented from them, superior to all other liens for taxes * * * and shall also have a general lien on the property of the debtor liable to levy and sale, and *such general lien shall date from the time of the levying of a distress warrant to enforce the same.*" (Italics ours.)

Texas Act, Article 1373, declares:

"The State of Texas *shall have a lien on all such property (of corporations) from the date that suit shall be instituted* by the Attorney General or district or county attorney acting under his direction, in any court of competent jurisdiction within this State, for the purpose of forfeiting the charter or canceling the permit of such corporation, or for such fines or penalties. The institution of such suit for such fine, penalties or forfeiture, shall constitute notice of such lien." (Italics ours.)

In respect of the Georgia Code, this Court said, in *Henderson* v. *Mayer*, 225 U. S. 634, at page 637:

> "The provisions of the bankruptcy act, preventing an insolvent from giving or the creditor from securing preferences for pre-existing debts, apply not only to mortgages and transfers voluntarily made by the debtor, but also to those preferences which are obtained through legal proceedings, whether the lien dates from the entry of the judgment, from the attachment before judgment, or, as in some states, from the levy of execution after judgment. But the statute was not intended to lessen rights which already existed, nor to defeat those inchoate liens given by statute, of which all creditors were bound to take notice, and subject to which they are presumed to have contracted when they dealt with the insolvent.

"Liens in favor of laborers, mechanics, and contractors are of this character; and although they may be perfected by record or foreclosure within four months of the bankruptcy, they are not created by judgments, nor are they treated as having been 'obtained through legal proceedings,' even when it is necessary to enforce them by some form of legal proceeding. The statutes of the various states differ as to the time when such liens attach, and also as to the property they cover. They may bind only what the plaintiff has improved or constructed; or they may extend to all the chattels of the debtor, or 'all the property involved in the business.' Re Bennett, 82 C. C. A. 531, 153 Fed. 673.

"In some cases the lien dates from commencement of the work, or from the completion of the contract. In others, prior to levy they are referred to as being dormant or inchoate liens, or as 'a right to a lien.' Re Bennett, 82 C. C. A. 531, 153 Fed. 677; Re Laird, 48 C. C. A. 538, 109 Fed. 554. But the courts, dealing specially with bankruptcy matters, have almost uniformly held that these statutory preferences are not obtained through legal proceedings, and therefore are not defeated by Section 67f, even where the registration, foreclosure, or levy necessary to their completion or enforcement was within four months of the filing of the petition in bankruptcy."

Accordingly, we submit that the construction placed upon the Georgia Code should likewise be placed upon the Texas Act in this cause. It was evidently the intention of the legislature that such should be the construction for the reason that in Article 1372 it is provided:

"All properties of such corporation (violating State laws and subject to the imposition of penalties) within this State *at the time of such violation, or which may thereafter come within this State shall by reason of such violation, become liable for such fines or penalties and for costs of suit and costs of collection.*" (Italics ours.)

If it was the legislative intent to subject all properties of corporations to penalties and forfeitures "at the time of such violation," then it can hardly be conceived why the right to the lien provided for in Article 1373 should not likewise reach back and attach to such property "at the time of such violation" after the filing of the suit to recover penalties.

2. The Circuit Court of Appeals erred in holding that the State court—in the suit by the State of Texas to recover delinquent taxes and to foreclose the statutory lien—in declining to appoint receivers lost jurisdiction over the property of respondent (debtor) upon the filing of the petition under Section 77-B notwithstanding the fact that citation and notice in the State's suit issued and service upon respondent (debtor) was had.

The majority opinion of the Circuit Court of Appeals cites the language contained in *Penn. Casualty Company* v. *Pennsylvania,* 294 U. S. 189, 195, as impelling the conclusion that in the State's tax suit (second suit) process had not issued in due course which would enable the State Court to retain exclusive jurisdiction of the *res* as against invasion by the bankruptcy court. In respect of this holding the Dissenting Judge said:

> "The authorities the opinion cites lead, I think, to a conclusion exactly the opposite of that the opinion announces, that because the court declined to appoint receivers it did not acquire jurisdiction over the property. They make it clear, I think, that in case of suits to foreclose a lien, valid as well after as before the institution of bankruptcy proceedings, 'jurisdiction attaches upon the filing of the bill of complaint in court, at least where process subsequently issues on a bill in due course.' *Penn Co.* v. *Pennsylvania,* 294 U. S. 189; *Harkin* v. *Brundage,* 276 U. S. 45-5; *Metcalf* v. *Barker,* 187 U. S. 165; *Palmer* v. *Texas Co.,* 212 Tex. 118;

Farmers Loan & Trust Co. v. *Lake Street*, 177 U. S. 51. In this case process issued in due course. The majority opinion is, therefore, in error in stating that this is not a case where process subsequently issued in due course. The error of the majority arises, I think, from the mistaken view that the appointment of a receiver, or other process of seizure, is necessary to give jurisdiction. *White Star Refining Co.*, 74 Fed. (2) 269, cited by the majority, announces and the announcement is supported by uniform authority, 'that the foreclosure of a lien not invalidated by bankruptcy on specific property *undertaken in a state court with or without receivership is unaffected by the subsequent filing of a bankruptcy petition against the owner of the property, and that the bankruptcy court as to that property has not paramount jurisdiction but only concurrent jurisdiction and must observe due comity is now well settled.*' (Italics mine.)''

The Dissenting Judge voices our contentions in this regard, and, we believe, he makes it clear that the majority members of the Circuit Court of Appeals have misread the teachings of this Court in *Penn. Casualty Company* v. *Pennsylvania, supra.* Moreover, the Dissenting Judge points out that the Trial Court found as a fact that in the State's tax suit (second suit) ''citation and notice were duly issued and service thereon was had.'' (Findings of fact of Trial Court VIII, R. 161.)

Aside from this, petitioners contend that the cases of *Metcalf* v. *Barker*, 187 U. S. 165; *Straton* v. *New*, 283 U. S. 318, 333; and *Duparquet, Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216, 224, should have controlled the decision of the Circuit Court of Appeals in respect of the State's tax suit wherein foreclosure of the tax lien was sought, this because it is not disputed that the statutory lien invoked by the State of Texas in its tax suit was in existence and had attached to respondent's properties more than four months before the filing of respondent's (debtor's) petition under

Section 77-B, and consequently could not have been rendered null and void under Section 67-f of the Bankruptcy Act (11 U. S. C. A., 107-f).

In this regard the Dissenting Judge (R. 161) points out the error of the majority in this language:

> "The error of the majority arises, I think, from the mistaken view that the appointment of a receiver, or other process of seizure, is necessary to give jurisdiction. *White Star Refining Co.*, 74 Fed. (2) 269 cited by the majority, announces, and the announcement is supported by uniform authority, 'that the foreclosure of a lien not invalidated by bankruptcy on specific property *undertaken in a state court with or without receivership is unaffected by the subsequent filing of a bankruptcy petition against the owner of the property, and that the bankruptcy court as to that property has not paramount jurisdiction but only concurrent jurisdiction and must observe due comity is now well settled.*' (Italics mine.)"

The opinion in *White Star Refining Company* (74 F. (2d) 269), was by the same court that decided this cause (Fifth Circuit) and the motor fuel tax law of the State of Texas was construed and applied in that case in such manner as to deny the right of a trustee in bankruptcy to dispossess State court receivers appointed by a State court which had entertained a suit on behalf of the State of Texas to collect motor fuel taxes and wherein the tax lien statute was invoked. The *White Star Refining Company* case was decided upon the principles announced in *Straton* v. *New* (283 U. S. 318, 333) *supra.*

It is significant that in *Duparquet, Huot & Moneuse Co.* v. *Evans*, 297 U. S. 216, this Court points out that Section 77-B does not make inapposite the principles announced in *Straton* v. *New, Metcalf* v. *Barker*, and other cases cited on page 222 of the *Duparquet* opinion.

3. The Circuit Court of Appeals erred in holding that the oil originally held by the State court receivers and which was in the hands of the bankruptcy trustee at the time of the filing of the State's motion seeking permission to confiscate (subject to the jurisdictional pleas) was valuable property and rightfully in the hands of the bankruptcy trustee and in denying the right of the State of Texas to institute confiscation proceedings against same in a State court.

The Circuit Court of Appeals in considering the motion of the petitioner, State of Texas, requesting leave to institute confiscation proceedings in one of its own courts against the oil in the hands of the bankruptcy trustee, and after referring to the provisions of the confiscation act (see Appendix C) declares:

> "The validity of this act is assailed as unconstitutional and void, but we deem it unnecessary to decide this contention. The oil was valuable property; it was not a nuisance *per se*; the title to it was in the debtor at the time the petition for reorganization was filed; and it passed to the trustee as part of the debtor's estate. It is now properly in the custody of the bankruptcy court."

In this aspect of the case the Dissenting Judge disagreed with the majority and said:

> "If the oil is 'unlawful oil,' and subject to condemnation, certainly by taking bankruptcy or by proceeding in reorganization, a willful violator may not change it into lawful oil. If the State was entitled to condemn it before the petition was filed, it was equally so entitled after it was filed. The proceeding to condemn is a special one; it must be followed exactly as provided for by the statute. *U. S.* v. *Smelser*, — F. (2) —; *Mingus* v. *Wadley*, 285 S. W. 1084. The bankruptcy court sitting in reorganization is not competent to inquire into or adjudge the condemnation. The re-

suit of the court's order in refusing permission to proceed, if effective to prevent the State's first proceeding, would be that the reorganization would proceed on the assumption that the oil was the debtor's property only to have that assumption disappear if in a condemnation suit filed after reorganization judgment went for the State. For it is perfectly plain that a proceeding, in which the question of whether the property is to be forfeited may not be tried and decided, cannot affect that question. Though, therefore, I am of the opinion that the bankruptcy court was without power to prevent the State's first proceeding with its suit to condemn, and that the State may proceed without permission, for the suit is not one *in rem*, and does not require the court to have possession of the property until the judgment of condemnation is entered, I think the State did the seemly thing in applying for permission, and that permission should have been granted as matter of course. If the oil is condemned while the property is still in the custody of the reorganization court, certainly that court can be depended upon in the exercise of the comity due between courts to surrender it on the State's writ for sale as the statute requires. I therefore dissent from the judgment of affirmance as to the condemnation proceeding."

The filing of the motion by the State seeking leave to institute such a confiscation suit in one of its courts was the only avenue open to it whereby it could effectually abate the nuisance of illegally produced oil. The State could not, by way of intervention in the bankruptcy court, accomplish the results sought to be attained under authority of its confiscation statute for the reason that the bankruptcy court has no jurisdiction to entertain a confiscation suit on behalf of the State seeking forfeiture of the oil because Article 6066a, Section 10 (see Appendix C) and cognate amendments under Title 102, Revised Statutes of Texas are penal in the international sense, and are not capable of being enforced in courts of the United States.

The penalty of forfeiture provided for results from violations of the conservation laws, and is visited upon violators in vindication of the State's policy in respect of its efforts to conserve its natural resources. Testing the statute by what is said in *Wisconsin* v. *Pelican Insurance Co. of New Orleans,* 125 U. S. 265, no other conclusion can be reached than that Article 6066a and related statutes are penal in the international sense. This decision follows the holding of Chief Justice Marshall in *The Antelope,* 10 Wheat. 66:

> "The courts of no country execute the penal laws of another."

Wisconsin v. *Pelican Insurance Co.* (125 U. S. 265) *supra,* is followed in *Huntington* v. *Attrill,* 146 U. S. 657, where the question of jurisdiction to enforce state penal laws is further discussed, the latter holding that the courts of the United States have no power to execute the penal laws of the individual states.[1]

The bankruptcy court should have granted the State leave to seek confiscation of the oil in question for the additional reason that, if it should prevail in its condemnation suit and establish the illegality of the oil, the forfeiture would take effect at the date of the commission of the unlawful act or acts connected with its production and handling, and title to same would at that time vest in the State of Texas although its title be not perfected until judgment of condemnation. Moreover, such forfeiture would constitute a statutory transfer of title to the oil to the State at the time the unlawful act or acts were committed, and the condemnation, when obtained, would relate back to that time and would void all intermediate sales and alienations, even to purchasers in good faith. This position is sus-

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[1] Compare *State of Indiana* v. *Alleghany Oil Co.,* 85 Fed. 870. *Leflar Extra State Enforcement of Penal and Governmental Claims,* 46 Harvard Law Review 193.

tained, we think, by the following decisions of this court: *United States* v. *1960 Bags of Coffee,* 8 Cranch. 298; *United States* v. *Stowell,* 133 U. S. 1; compare *Griswold* v. *President of the United States,* 82 F. (2d) 922.

Conclusion.

It is, therefore, respectfully submitted that this cause is one calling for the exercise by this court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the Circuit Court of Appeals and the decree of the District Court.

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APPENDIX A.

ARTICLE 1372. (1193) Law Violations.—Whenever any domestic or foreign corporation in this State shall violate any law of this State, including the law against trusts, monopolies and conspiracies or combinations or contracts in restraint of trade, for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within this State at the time of such violation, or which may thereafter come within this State, shall, by reason of such violation, become liable for such fines or penalties and for costs of suit and costs of collection. (Acts 1907, p. 175.) (Title 32, Ch. 6, Revised Statutes of Texas.)

ART. 1373. (1193) Lien, Notice.—The State of Texas shall have a lien on all such property from the date that suit shall be instituted by the Attorney General or district or county attorney acting under his direction, in any court of competent jurisdiction within this State, for the purpose of forfeiting the charter or canceling the permit of such corporation, or for such fines or penalties. The institution of such suit for such fine, penalties or forfeiture, shall constitute notice of such lien. (Acts 1907, p. 175.) (Title 32, Ch. 6, Revised Statutes of Texas.)

ART. 6036. Penalty.—In addition to being subject to any forfeiture that may be provided for by law and to any penalty that may be imposed by the Commission for contempt for the violation of its rules, regulations, or orders, any person violating any of the provisions of this Act or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, or violating any rule, regulation, or order of the Commission promulgated thereunder, shall be subject to a penalty of not more than One Thousand Dollars ($1000) for each and every day of such violation, and for each and every act of such violation, to be recovered in any Court of competent jurisdiction in Travis County, or in the county of the residence of the defendant or, if there be more than one defendant, in the county of the residence of any of them, or in the county in which the violation is alleged to have occurred, such suit by direction of the Commission

to be instituted and conducted in the name of the State of Texas by the Attorney General or by the county or district attorney where such suit is brought. The recovery or payment of any such penalty shall not authorize the violation of any provision of this Act, or Title 102, Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation, or order of the Commission promulgated thereunder.

Any person aiding or abetting any other person in the violation of this Act, or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation, or order of the Commission promulgated thereunder, shall be subject to the same penalties as are prescribed herein for violation thereof by any such other person. (As amended Acts 1929, 41st Leg., p. 694, ch. 313, par. 4; Acts 1931, 42nd Leg., 1st C. S., p. 46, ch. 26, par. 3; Acts 1934, 43rd Leg., 3rd C. S., p. 120, ch. 64, par. 2; Acts 1935, 44th Leg., p. 180, ch. 76, par. 12.) Effective April 13, 1935.

APPENDIX B.

Taxing Act.

(ART. 7065a—1. DEFINITIONS.)

(a) "Motor Fuel" shall mean and include any volatile or inflammable liquid by whatever name such liquid may be known or sold, which is used or usable, either alone or when mixed or compounded, for the purpose of generating power for the propulsion of motor vehicles including crude petroleum, if so used. The term "motor fuel," however, shall not include the product commonly known as kerosene, nor any other distillate of, or condensate from petroleum, or any other product with a flash point above 112 degrees Fahrenheit according to the United States official closed testing cup method of the United States Bureau of Mines, except when such kerosene, distillate, condensate, or any other product, either alone or blended with motor fuel, is used in operating motor vehicles on the public highways.

(b) "Motor Vehicle" shall mean and include every vehicle operated upon the highways of this State which is propelled by the use of motor fuel.

(c) "Distributor" shall mean and include every person in this State who refines, manufactures, produces, blends or compounds motor fuel, or in any other manner acquires or possesses motor fuel and makes first sale of the same in this State; and it shall also include every person in this State who ships, transports or imports any motor fuel into this State and makes the first sale of same in this State.

(d) "First Sale" shall mean and include the first sale, distribution or use in this State of motor fuel refined, blended, imported into, or in any other manner produced in, acquired, possessed or brought into this State.

(e) "Person" shall mean and include every individual, firm, association, joint stock company, syndicate, co-partnership, corporation, trustee, agency or receiver.

(f) "Dealer" shall mean and include every person other than a distributor who engages in the business in this State of distributing or selling motor fuel within this State.

(g) "Public Highway" shall mean and include every way or place of whatever nature open to the use of the public as a matter of right for the purpose of vehicular travel.

(h) "Comptroller" shall mean Comptroller of Public Accounts of the State of Texas. (Acts 1933, 43rd Leg., p. 75, ch. 44, par. 1, as amended Acts 1935, 44th Leg., p. 558, ch. 240, par. 1.)

Effective May 11, 1935.

(Art. 7065a-2. Occupation or Excise Tax; Rate; Reports by Distributors to Comptroller.)

(a) There is hereby imposed an occupation or excise tax of four (4) cents on each gallon of motor fuel or fractional part thereof. The said tax shall accrue and be paid as hereinafter provided upon the first sale in Texas.

(b) The tax shall accrue on the first sale so that a single tax only will be collected on the same gallon of motor fuel, it being intended to impose the tax at its source in Texas, or as soon thereafter as such motor fuel may be subject to being taxed. No person, however, shall be required to

pay a tax on motor fuel imported into this State in the tank of a motor vehicle, connected with and which feeds the carburetor or substitute therefor, in quantities of thirty (30) gallons or less when such motor fuel is actually used in said vehicle, and is not extracted from said tank for sale, distribution or use... Provided, however, that any manufacturer, producer or refiner in this State may at his option, transfer the tax herein imposed upon the sale of casinghead gasoline, natural gasoline, or drip gasoline to any distributor holding a permit under the terms of House Bill 247, Chapter 44 (Arts. 7065a—1 et seq., P. C. art. 141a—1), General Laws of the Regular Session of the Forty-third Legislature, as amended by this Act; provided further, that said manufacturer, producer or refiner shall keep in Texas for a period of two (2) years a complete record of every such sale of casinghead gasoline, natural gasoline or drip gasoline, upon which the tax is so transferred, upon the form manifest prescribed in Section 8 (b) (Art. 7065a—8) of House Bill 247, Chapter 44, General Laws of the Regular Session of the Forty-third Legislature, as amended by this Act, giving full details of such sale, as provided to be given in said form manifest. The manifest shall be signed by the manufacturer, producer or refiner and the duplicate manifest shall be delivered to the person receiving the casinghead gasoline, natural gasoline or drip gasoline; provided, further, with the exception of rail shipments, every person receiving said casinghead gasoline, natural gasoline or drip gasoline, or any part of the same, shall receipt on the manifest for the quantity received by him. Provided, further, with the exception of rail shipments, said manufacturer, producer or refiner shall report each and every sale upon which the tax is so transferred, to the Comptroller within five (5) days after making the same, giving full details of such sale, as provided to be given in the form manifest aforesaid. Provided, further, that said manufacturer, producer or refiner, before making a first sale of casinghead gasoline, natural gasoline or drip gasoline to any person other than a distributor holding a permit under the terms of House Bill 247, Chapter 44, General Laws of the Regular Session of the Forty-third Legislature, as amended by this Act, shall obtain a dis-

tributor's permit and furnish a surety bond, and in all respects qualify as a distributor of motor fuel.

(c) No tax shall be imposed on any motor fuel, the imposing of which would constitute an unlawful burden on interstate commerce and which is not subject to be taxed under the Constitution of the State of Texas and the United States; and provided, that the tax imposed herein shall be in lieu of any excise or occupation tax imposed by the State or any political subdivision thereof, on motor fuel.

(d) Every distributor making first sale of motor fuel shall pay to the State of Texas an occupation or excise tax equal to four (4) cents per gallon or fractional part thereof, so sold, distributed or used, and such tax shall be due and payable at the office of the Comptroller at Austin, Texas, on the 20th day of each month, the same to be based on such sales or use made during the calendar month next preceding, and at the same time, such distributor shall make and deliver to the Comptroller a report properly sworn to and executed by such distributor or his representative in charge, on such forms as the Comptroller shall prescribe, which, among other things, shall give the number of gallons of motor fuel sold, distributed or used, intrastate and interstate, and exported during the preceding calendar month, and the number of gallons of motor fuel used, distributed or lost by fire or otherwise upon which no tax is paid. Provided also, that the said report shall include the exact quantity of crude oil or petroleum products used or consumed during the period covered by the report in the manufacturing, refining or processing of motor fuel.

(e) Provided, however, that the tax on one per cent of the taxable gallonage shall be deducted by the distributor to cover losses and the expense of complying with the provisions hereof.

(f) If any distributor, or other person, shall export or lose by fire or other accident, any motor fuel, so that the same may never be made use of within this State, after the tax has been paid on such motor fuel, claim for refund may be made in the manner hereinafter provided, or as the Comptroller may direct. However, no claim shall be made

for such loss due to any one accident or export of less than one hundred (100) gallons. Provided, however, that showing must be made that said tax was paid, and the Comptroller shall deduct from such refund made under the provisions of this Act, the one per cent allowed above.

(g) The tax herein imposed shall be posted separately from the price of the motor fuel, wherever sold in this State. (Acts 1933, 43rd Leg., p. 75, ch. 44, par. 2, as amended Acts 1935, 44th Leg., p. 558, ch. 240, par. 2.)

Effective May 11, 1935.

(Art. 7065a—7. State's Lien on Property of Distributor for Taxes, Fines, Etc.)

All taxes, fines, penalties and interest due by any distributor to the State shall be a preferred lien, first and prior to any and all other existing liens, contract or statutory, legal or equitable, and regardless of the time such liens originated upon all the property of any distributor, devoted to or used in his business as a distributor, which property shall include refinery, blending plants, storage tanks, warehouses, office buildings and equipment, tank trucks or other motor vehicles, stocks on hand of every kind and character whatsoever used or usable in such business, including crude oil or other materials for the manufacture, refining, blending or compounding of motor fuels and the refined products therefrom and the proceeds from the sale of such materials and refined products, and any other property of every kind and character whatsoever and wherever situated devoted to such use, and each tract of land on which such refinery, blending plant, tanks or other property is located, or which is used in carrying on such business.

If any distributor shall fail to remit proper taxes due, the Comptroller may employ auditors or other persons to ascertain the correct amount due, and if such taxes have not been properly remitted, the distributor shall pay the reasonable expenses incurred in such investigation and audit as additional penalty. Provided however, that all funds paid to the auditors of the Comptroller as expenses incurred in making audits, shall be placed in a special fund in the State Treasury, which shall be used until exhausted

for making other audits, and said sums are hereby appropriated for that purpose. Provided, that nothing herein shall prevent the Comptroller, when said fund is exhausted, from using other funds available for that purpose. (Acts 1933, 43rd Leg., p. 75, ch. 44, par. 7, as amended Acts 1935, 44th Leg., p. 558, ch. 240, par. 6.)

Effective May 11, 1935.

(Title 122, Art. 7065a—1, 2, and 7, Revised Statutes of Texas.)

APPENDIX C.

(Art. 6066a). Definition of Terms.

Section 1. (a) The word "Commission" shall mean the Railroad Commission of Texas. The phrase "order of the Commission" shall include any rule, regulation or order adopted by the Railroad Commission of Texas pursuant to the oil and gas conservation statutes of this State, including all provisions of Title 102 of the Revised Civil Statutes of Texas of 1925 and all amendments thereto.

(b) The word "oil" or phrase "crude oil" herein used shall include crude petroleum oil in its natural state as produced and crude petroleum oil from which only the basic sediment and water have been removed. The word "gas" herein used shall include natural gas, bradenhead gas, casinghead gas, and gas produced from an oil or gas well.

(c) The word "product" shall include refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil, residuum, gas oil, casinghead gasoline, natural gas gasoline, naphtha, distillate, gasoline, kerosene, benzine, wash oil, waste oil, blended gasoline, lubricating oil, blends or mixtures of petroleum and/or any and all liquid products or by-products derived from crude petroleum oil or gas, whether hereinabove enumerated or not.

(d) "Unlawful oil," as that term is used herein, shall include oil which has been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the Commission, and oil which has been produced within said State in violation of any law of said State or in violation of any order of the Commission, and shall include any oil transported in violation of any such law or in violation of any such order.

(e) "Unlawful product" shall be construed to include any product any part of which was processed or derived in whole or in part from unlawful oil or from any product of unlawful oil, or from unlawful gas, or which is transported in violation of any order of the Commission or in violation of any law of Texas.

(f) "Unlawful gas" shall be construed to include gas produced or transported in violation of any order of the Commission or so produced or transported in violation of any law of Texas.

(Forfeiture of Unlawful Products; Attorney General Duties.)

SEC. 10. (a) All unlawful oil and unlawful products, regardless of the date of production or manufacture thereof, are hereby declared to be a nuisance and shall be forfeited to the State as hereinafter provided. It shall be the duty of the Commission, its servants, agents, and employees, highway patrolmen, sheriffs, constables, and peace officers, upon the discovery of any unlawful oil or unlawful products, to file immediately with the Attorney General of Texas, a report giving a description of such unlawful oil and/or unlawful products, including the ownership, party in possession, the amount, the location and classification thereof.

(b) When the Attorney General is advised from any source of the presence and existence of unlawful oil and/or unlawful products it shall be his duty to institute a suit in rem against such unlawful oil and/or unlawful products and against all persons owning, claiming or in possession thereof, such suit to be brought in the name of the State

of Texas in any court of competent jurisdiction in Travis County or in the county in which such oil or product is located. If it shall appear to the court from an examination of the petition or after hearing evidence thereon at a preliminary hearing that unlawful oil and/or unlawful products mentioned in the petition are in danger of being removed, wasted, lost, or destroyed, the court is authorized and required, in term time or in vacation, to issue restraining orders or injunctive relief, either mandatory or prohibitive, or to appoint a receiver to take charge of the oil or product in question, or to direct the sheriff of the county in which the unlawful oil or unlawful products are located to seize and impound the same until further orders of the court.

(c) Notice of pendency of such suit shall be served in the manner prescribed by law; either party to said suit may demand a trial by jury on any issue of fact raised by the pleadings and the case shall proceed to trial as other civil cases. If, upon the trial of such suit the oil or product in controversy is found to be unlawful oil or unlawful products, then the court trying said cause shall render judgment forfeiting the same to the State of Texas and authorizing the issuance of an order of sale directed to the sheriff or any constable of the county where the oil or products are located commanding such officer to seize and sell said property in the same manner as personal property is sold under execution. The court may order the oil or products sold in whole or in part as may be deemed proper and the sale shall be conducted at the court house door of the county where the oil and/or products are located and shall conform in all respects to the sale of personal property as aforesaid. The money realized from the sale of any such unlawful oil and/or products shall be applied, first, to the payment of the costs of suit and expenses incident to the sale of such oil and/or products after such expenses have been approved and allowed by the court trying the case, and all funds then remaining, shall be remitted forthwith to the State Treasurer and shall be by the Treasurer placed to the credit of the General Revenue Fund of the State of Texas.

(d) The officers of said Court shall receive the same fees provided by law for other civil actions. Provided further that the Sheriff executing said sale shall issue a bill of sale or certificate to the purchaser of said oil and/or products and the Commission shall, upon the presentation of said certificate of clearance, issue a tender, if a tender is required, permitting the purchaser of said oil and/or products to move the same into commerce. (Acts 1935, 44th Leg., p. 624, ch. 246.) (Title 102, Art. 6066a, Revised Statutes of Texas.)

Effective May 12, 1935.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 28

STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDE, RECEIVERS, ETC.,

Petitioners,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR STATE OF TEXAS.

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W. J. HOLT,
WILLIAM C. DAVIS,
CHARLES M. KENNEDY,
EARL STREET,
MARVIN TREVATHAN,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 28

STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDE, RECEIVERS, ETC.,

Petitioners,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR STATE OF TEXAS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Opinions Below.

The opinion of the Circuit Court of Appeals (R. 115-125) is reported in 88 F. (2d) 48.

Jurisdiction.

The decree below was entered February 15, 1937 (R. 124). The petition for writ of certiorari was filed April

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13, 1937, and was granted May 3, 1937; the order allowing certiorari "limited (consideration by the Court) to the questions raised upon the application of the State for permission to take proceedings for the confiscation of the alleged illegal oil" (R. 130). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by Act of February 13, 1925, U. S. C. A., Title 28, Section 347 (a) as interpreted in Rule 38, Subsection 5 (b) of this Court.

Questions Presented.

1. Whether or not Article 6066a, Section 10, Revised Civil Statutes of Texas (Acts 1935, 44th Leg., p. 624, ch. 246) is violative of the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States by its attempted enforcement against the alleged unlawful oil held by the Trustee in Bankruptcy.

2. Whether or not the District Court and the Circuit Court of Appeals for the Fifth Circuit erred in declining to grant permission to the State of Texas to take proceedings for the confiscation of alleged illegal oil in a Texas State Court of competent jurisdiction seeking confiscation of such alleged illegal oil according to the provisions of Section 10, Article 6066a, Revised Civil Statutes of Texas (Acts 1935, 44th Leg., p. 624, ch. 246).

Statutes Involved.

For the pertinent provisions of the Acts of the Legislature of Texas, Article 6049e (Acts 1935, 44th Leg., p. 180, ch. 76) see Appendix "A", and Article 6066a (Acts 1935, 44th Leg., p. 624, ch. 246) see Appendix "B".

Statement.

Since this Court has limited consideration of this cause to the questions raised upon the application of the State of

Texas for permission to take proceedings for the confiscation of the alleged illegal oil in the hands of the Bankruptcy Trustee, the other proceedings asserting the lack of jurisdiction of the Bankruptcy Court under Section 77B of the Amended Bankruptcy Act to dispossess prior State Court Receivers will not be adverted to in this Brief (R. 130).

Subject to the jurisdictional pleas filed by the State of Texas and the State Court Receivers (R. 32), the Attorney General of the State of Texas filed in the Bankruptcy Court a proceeding seeking permission from the Bankruptcy Court to institute a confiscation proceeding (a suit in rem) in one of the State Courts against the alleged illegal oil, the debtor corporation and the Trustee in Bankruptcy and the other interested parties (R. 75). The oil was described and its location pointed out (R. 76). It was alleged the Railroad Commission under the laws of the State of Texas and the administrative orders of the Railroad Commission promulgated pursuant thereto, had in force, from the year 1932 up to the present, valid orders, regulating and prorating the allowable production of crude petroleum oil for each and every well in the East Texas field, which comprises the counties of Rusk, Gregg, Upshur, Smith, and Cherokee, and that at all times since August 12, 1931, the Statutes of the State of Texas prohibited the purchase, transportation or handling of crude petroleum oil produced in whole or in part in excess of the amount allowed by statute or by any rule, regulation or order of the Railroad Commission of Texas; that at all times since September 29, 1932, the Railroad Commission of Texas had in force valid rules, regulations and orders regulating the oil industry, looking to more effective enforcement of such statutes, including requirements for securing crude oil tenders and certificates of authority before crude oil could be transported in Texas; that at all times since April 13, 1935, the statutes of Texas

prohibited the transportation or handling in any way of illegal oil or the products of illegal oil as defined by the laws of Texas, and further prohibited the transportation or handling in any way of oil or the products of oil transported or handled in violation of any rule, regulation or order of the Railroad Commission; that oil produced conformably to the statutes and the rules, regulations and orders of such Commission is generally known as "allowable oil" and any oil produced from any well in excess of the quota or allowable assigned to any such well is commonly known as "excess oil", "hot oil" or "unlawful oil." That the proration schedules assigning the quotas and allowable production to each well are public records, and notices of same are furnished to the operators in the field; that such operators are charged with the knowledge of the provisions of such allowable schedules. That the oil described in the intervention of the Attorney General on behalf of the State of Texas by reason of the same having been produced in violation of the rules and regulations of the Railroad Commission were that such oil was produced in excess of the allowable granted to the wells from which the same was produced; and that, after such oil had been ~~over~~produced, the products therefrom were transported without procuring approved tenders and certificates of clearance as required by the orders of the Railroad Commission. The Attorney General further asserted that by reason of the fact that the oil was not only produced in violation of the laws of the State of Texas, but was likewise transported in violation of the laws of the State of Texas, the same was subject to confiscation under the laws of the State of Texas in an action by the State of Texas; and the Attorney General sought permission to institute such proceedings in a court of competent jurisdiction in the State of Texas for the reason that it was not within the competency of the Courts of the United States sitting in bankruptcy to entertain a proceeding in the nature of a

suit seeking to confiscate unlawful crude oil and unlawful crude oil products as defined by the laws of the State of Texas; further, it was alleged that to permit the Bankruptcy Court to retain possession of such unlawful oil and unlawful products would amount to the suspension by the Bankruptcy Court of valid penal statutes of the State of Texas and to a suspension of valid rules and regulations of the Railroad Commission of Texas looking to the conservation of the natural resources of the State. Further, that if the Bankruptcy Court be permitted to retain possession of the unlawful oil and unlawful products, the State of Texas would be defeated of its right to confiscate unlawful and contraband property, which under the laws of the State of Texas was forfeited to it and subject to forfeiture proceedings, whereby such unlawful oil and unlawful products, after judgment of condemnation, would be subject to sale at public auction, and the money derived therefrom placed in the General Revenue Fund of the State of Texas, the law under such sale entitling the purchaser thereof to a certificate of clearance to move such oil in commerce.

The Attorney General accordingly asked leave of the Bankruptcy Court to institute the confiscation proceeding in a State Court of Travis County, Texas, looking to the adjudication of the legality of the oil in a State Court, and thereby to establish the rights of the State of Texas to the unlawful oil and unlawful products in question (R. 75-82)[1].

The District Judge declined to permit the Attorney General to institute confiscation proceedings in the State Court

[1] Under paragraph VII of the petition (R. 79) reference is made to certain rules, regulations and orders of the Railroad Commission governing the production and transportation of oil in the East Texas oil fields. Copies of the original orders were attached to the petition seeking leave to institute the confiscation suit in a State Court. On account of their great length the originals by order of the District Judge were sent up to the Circuit Court; and that court by order has transmitted copies of the originals to this Court for consideration.

against the oil (R. 86). The Circuit Court upon this point declared:

> "The validity of this act (Article 6066a, Section 10) is assailed as unconstitutional and void, but we deem it unnecessary to decide this contention. The oil was valuable property; it was not a nuisance *per se;* the title to it was in the debtor at the time the petition for reorganization was filed; and it passed to the trustee as part of the debtor's estate. It is now properly in the custody of the bankruptcy court"[2] (R. 119).

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[2] In the Circuit Court of Appeals the Trustee and the debtor assailed the confiscation act as being in contravention of the 14th Amendment to the Federal Constitution. In this Court the Trustee assails the confiscation act upon the same ground asserted in the Circuit Court, and, in addition, sets forth certain provisions of the oil conservation statutes and the provisions of certain rules of the Railroad Commission promulgated pursuant thereto which regulate different phases of the oil business in Texas—different from the statutes and rules regulating *production* and *transportation*—and complains that, for the State to declare the violation of any one of them would result in a forfeiture of oil, would cause such statute to impose "so harsh and unreasonable and oppressive (penalties) as to go beyond the limits of the State's police power to prescribe penalties for violations of the law." (Br. in Opp. 24-30.) These provisions of the law are not involved, and no attempt has been made by the State to apply the same to the disadvantage of the debtor, and accordingly, their constitutionality may not be raised here by either the debtor or the Trustee for the reason that the State in its petition asking leave to confiscate the oil does not set forth or complain that the oil or oil products became illegal by virtue of the debtor's having violated those statutes and orders of which he complains. The State's petition specifically alleges that the debtor overproduced the oil and oil products in violation of the proration laws, and transported the same in violation of the statutes and orders of the Commission requiring approved tenders for its transporting. A litigant can be heard to question only those matters which are being or are about to be applied to his disadvantage. *Utah Power and L. Co.* v. *Pfost,* 286 U. S. 165, 186; *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172, 180-181; *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Gorieb* v. *Fox,* 274 U. S. 603, 606. As was stated in *Hicklin* v. *Coney,* 290 U. S. 169, 172-173:

> "Another objection, that the Railroad Commission was authorized to regulate the rates of private contract carriers, was answered by the state court in saying that the Commission had never exercised such a power, 'if any it has under the act,' and hence that appellant had no ground for complaint. This is an adequate answer here, on the present showing, as the Court does not deal with academic contentions." (Citing cases.)

Opposed to this majority holding, the dissenting judge of the Circuit Court said:

> "If the oil is 'unlawful oil' and subject to condemnation, certainly by taking bankruptcy or by proceeding in reorganization a willful violator may not change it into lawful oil. If the state was entitled to condemn it before the petition was filed, it was equally so entitled after it was filed" (R. 123).

Specifications of Error.

The District Court sitting in Bankruptcy and the Circuit Court of Appeals erred in refusing to permit the Attorney General to institute confiscation proceedings in a State court against the alleged illegal oil and illegal oil products; the Trinity Refining Company, debtor, and the Trustee in Bankruptcy hold possession of same.

Summary of Argument.

1. The State of Texas under the police power has the undoubted right to conserve its natural resources.

2. The validity of the orders of the Railroad Commission of Texas promulgated pursuant to statutes of the State regulating its oil resources was established by judicial decision in 1932; and said orders remained and were in effect at the time the oil in question was overproduced and transported in violation of law.

3. To more effectively carry out the declared policy of the State to conserve its natural resources the Legislature of Texas in the exercise of its police power enacted Article 6066a, Section 10, which declares oil, which is defined to be unlawful, to be a nuisance, and the same is forfeited to the State of Texas by said act. The Attorney General is authorized to institute a suit *in rem* against the oil and against all interested parties. After judgment of con-

demnation is entered against the oil, the statute directs that it be sold at public auction, the proceeds derived therefrom placed in the General Revenue Fund of the State of Texas and the purchaser at such sale entitled to a certificate of clearance to move the same in commerce.

4. Courts of bankruptcy have no jurisdiction to entertain a suit brought by the State to have forfeited oil which has been produced and transported in violation of its laws; such forfeiture statute being penal in the international sense.

5. If judgment of condemnation in the State's suit to confiscate the alleged illegal oil should go against the oil in question, the forfeiture would take effect at the date of the commission of the unlawful act or acts connected with its production and handling and the right to the property would at such time vest in the State of Texas, although its title would not be perfected until judicial condemnation; forfeiture having taken place at the time stated, the title to such oil could not have been in the debtor at the time of the filing of its petition for reorganization; consequently, the Trustee in Bankruptcy would at this time be in no better position than the debtor to assert title thereto by virtue of the provisions of the Bankruptcy Act.

ARGUMENT.

I.

Authority of the State of Texas to Regulate the Production of Oil.

The courts of the State of Texas and the Federal courts residing in the Fifth Circuit have upheld the validity of orders of the Railroad Commission prorating the production of crude oil in the State of Texas; the Railroad Com-

mission, since the decision of *Danciger Oil & Refining Company* v. *Railroad Commission*, 49 S. W. (2d) 837, has continued to regulate the production of oil in the East Texas field; and that right has been recognized and reaffirmed by the decision of the Texas Supreme Court in *Brown* v. *Humble Oil & Refining Company*, 83 S. W. (2d) 935; opinion on rehearing, 87 S. W. (2d) 1069. Accordingly, the Commission has continued to exercise the powers granted to it by the statutes of the State when it undertakes to regulate production in the East Texas oil field.

> "Federal cases are Amazon Petroleum Corporation *v.* Railroad Commission (D. C.), 5 F. Supp. 633; People's Petroleum Producers *v.* Sterling (D. C.), 60 F. (2) 1041; Danciger Oil & Ref. Co. *v.* Smith (D. C.), 4 F. Supp. 236." *Griswold* v. *The President of the United States*, 82 F. (2d) 922.

The right of the State, in the exercise of its police power, to regulate the production of oil in an effort to conserve its natural resources and to prevent waste has been declared by this Court in the following cases:

Champlin Refining Company v. *Corporation Commission*, 286 U. S. 210;

Bandini Petroleum Company v. *Superior Court*, 284 U. S. 8;

Ohio Oil Company v. *Indiana*, 177 U. S. 190;

Lindsley v. *Natural Carbonic Gas Company*, 220 U. S. 61;

Walls v. *Midland Carbon Company*, 254 U. S. 300.

II.

The Legislature of the State of Texas May Enact Legislation Designed to More Effectively Conserve the State's Natural Resources, by Imposing Penalties and Forfeitures Upon Violators, Thereby Discouraging Transgressions of Such Laws.

That the East Texas oil field from its discovery up to the years of 1933, 1934, and 1935 constituted a major problem with which the Legislature, the Governor, the Attorney General and the various administrative agencies of the State had to cope is demonstrated by the decision in *Constantin* v. *Smith,* 57 F. (2d) 227, by a specially constituted Three-Judge Court sitting in the Western District of Texas and by the decision of this Court in *Sterling* v. *Constantin,* 287 U. S. 378, affirming the decision of the District Court.

The chaotic conditions existing in the East Texas oil field are especially adverted to in the case of *Thompson* v. *Spear,* — F. (2d) — (not officially reported), by the Circuit Court of Appeals for the Fifth Circuit (decided July 23, 1937), in which case the complainant, Spear, brought a suit in equity against the Railroad Commission of Texas asserting that during the years of 1933, 1934 and 1935 the members of the Railroad Commission of Texas through their negligent enforcement of the oil proration orders and their willful discrimination against him, permitted leaseholders adjoining his oil properties to so overproduce their oil wells that excessive drainage resulted to his land, causing great damage to his property, for which reason it was necessary that he also overproduce his wells in order to capture the oil underlying his land, which he asserted rightfully belonged to him under the law. The Court, after discussing the difficulties besetting the enforcement of the proration laws of the State by the Railroad Com-

mission of Texas set forth in the opinion, called attention to the mild penalties imposed by statute upon persons who should violate the conservation laws. The Court further pointed out that:

> "Injunctive procedure in aid of enforcement had proven of little value to the Commission, and as some of the neighboring leases and wells represented such large investments as to be unprofitable unless produced in excess of quotas, a situation was created where the violation of the state laws, and regulations thereunder, was more common than observance, the sovereign power of the state being taxed to the extent of requiring the declaration of martial law for a time.
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> "On May 11, 1935, the Legislature of the State of Texas amended its conservation laws, providing for new forms of procedure, new penalties, and *a more effective agency for their enforcement. Among other things, the Act provided that 'all unlawful oil and unlawful products, regardless of the date of production or manufacture thereof, are hereby declared to be a nuisance and shall be forfeited to the State as hereinafter provided,'* and defined 'unlawful oil' as meaning oil which 'had been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the (Railroad) Commission, and oil which has been produced within said state in violation of any law of said state or in violation of any order of the Commission.' The law further provides for judicial seizure and forfeiture of unlawful oil to the State of Texas. Section 10, Article 6066a, Revised Civil Statutes of Texas, 1925 as amended. This legislation was passed subsequent to and consonant with the so-called Connally Hot Oil Act, effective February 22, 1935 (15 U. S. C. A. 715, *et seq.*) under which appropriate enforcement agencies were established. The two agencies began to function, and, as a result of the more stringent provisions of the two acts, as well as the cooperative efforts of the two agencies, many cases were made for injunctions, *forfeitures* and criminal

prosecutions, so that in a comparatively short time *orderly government replaced chaotic disorder*."[3] (Italics added.) *Thompson* v. *Spear*, — F. (2d) —.

This language of the Circuit Court of Appeals demonstrates that before the advent of the State's confiscation act the Legislature was faced with the problem of enacting legislation which should more effectively enforce the State's oil and gas conservation laws and that the confiscation act was designed to promote the general welfare of the State. We submit that one of the most effective methods of preventing overproduction of oil is to take the profit out of the excess oil. It has been noted in *Thompson* v. *Spear* (— F. (2d) —), *supra*, that "injunctive procedure in aid of enforcement had proven of little value to the Commission" in preventing overproducing of oil in Texas. When overproduced oil is actually taken away from the law violator, no profit at all results from the illegal act, thereby discouraging to a large degree the activities of oil operators in overproducing and transporting illegal oil.

III.

Legislative Discretion.

The subject presented was a matter for the exercise of legislative discretion, and the Legislature of Texas was au-

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[3] On April 29, 1935, a specially constituted Three Judge Federal Court in the case of *Hercules Oil & Refining Company* v. *Thompson*, 10 F. Supp. 988, declared that oil produced and handled in violation of the conservation laws should be placed in the same category with illegal liquors, and the production and handling of unlawful oil should be looked upon as a public nuisance. Moreover, the Texas Courts have refused to permit the movement of excess oil in commerce notwithstanding the fact that the persons overproducing the same had paid a penalty for violating the rules of the Commission in respect of overproduction and "it cannot be said that the mere payment of the penalty for having produced the oil illegally will change its character and entitle the owner thereof to deal in it as it would in oil legally produced." *Railroad Commission* v. *Skipper-Bivins Oil Co., Inc.*, 85 S. W. (2d) 1048 (writ of error refused by Supreme Court). *Railroad Commission of Texas* v. *Haynes Drilling Company*, 94 S. W. (2d) 200.

thorized to determine and select the means to be adopted to accomplish the end desired; namely, to more effectively conserve the State's natural resources.

In respect of this question this Court has many times announced the rule that the choice of the means to achieve a purpose which is competent for a government to put into effect is a matter of legislative discretion; further, where the choice made bears a reasonable relation to the purposes sought to be attained, the exercise of the discretion is not subject to judicial review. Whether the method adopted be wise or unwise, whether best or poorest, are not questions with which the courts are concerned in passing judgment upon the power to prescribe them or their enforcement according to the means selected. *Chicago B. & Q. R. Company* v. *McGuire,* 219 U. S. 549, 569; *Block* v. *Hirsh,* 256 U. S. 135; *Ohio Oil Company* v. *Indiana,* 177 U. S. 190; *Walls* v. *Midland Carbon Company,* 254 U. S. 300.

Fairly debatable questions as to the reasonableness, wisdom and propriety of the legislative determination are not for the courts but for the legislative body. *Standard Oil Company* v. *Marysville,* 279 U. S. 582; *Jacobson* v. *Massachusetts,* 197 U. S. 11.

IV.

The Test of Reasonableness.

A police regulation which bears a reasonable relation to an object within the governmental authority is valid. The recognized test of reasonableness was laid down by this Court in *Chicago B. & Q. R. Company* v. *Illinois,* 200 U. S. 561, 592, when it said:

> "And the validity of a police regulation, whether established directly by the state or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation,

whether arbitrary or reasonable, and whether really designed to accomplish a legitimate public purpose."

The Legislature of the State of Texas evidently viewed unlawful oil in the same light as did the court in *Hercules Oil Company* v. *Thompson et al.*, 10 F. Supp. 988, which was decided on April 29, 1935, where it said:

> "We think it may not be doubted that the state has the right to prohibit the production of oil to prevent waste, because such production is in the nature of a public nuisance, and that it may make and authorize all reasonable regulations to bring about the abatement of this nuisance, extending to preventing movement in commerce of illegally produced oil and its products. We think it perfectly reasonable for the state, as a part of a preventive plan, to thoroughly abate the nuisance, to forbid the transportation, either interstate or intrastate, of oil illegally produced, and that a prohibition against the movement of such oil and its products in commerce is unquestionably valid. Atlas Pipe Line Co. *v.* Sterling (D. C.) 4 F. Supp. 441."

The Federal cases supporting the right to close, as nuisances, places where illegal liquor is sold are ample authority to sustain the Texas act, prohibiting the transportation of, handling of illegally produced oil or its products. On May 11, 1935, Article 6066a and Article 6049e became effective. Section 10 of Article 6066a declares illegal oil to be a nuisance and provides for its forfeiture to the State; Section 10 of Article 6049e prohibits the purchase, acquisition, sale, transportation, refining, processing or the handling in any other way of crude petroleum oil produced in whole or in part in violation of any oil or gas conservation statutes of this State or of any rule, regulation or order of the Commission promulgated pursuant to statute. By the provisions of the same section these prohibitions apply to the products of crude petroleum oil. These statutes declare

the common law rule upon the subject, for as will be later pointed out, the courts had already declared illegal oil to be contraband, and had declined to permit its movement in commerce.

Oil handled in violation of law has been declared by the courts to be contraband and its movement in commerce has been prohibited. *Railroad Commission* v. *Archer,* 80 S. W. (2d) 506. Compare *Railroad Commission* v. *Burnham,* 80 S. W. (2d) 496; *Railroad Commission* v. *Tyler, Texas Oil & Refining Company,* 80 S. W. (2d) 500; *Railroad Commission* v. *Bradshaw,* 80 S. W. (2d) 508; and *Railroad Commission* v. *Linzie Refining Company,* 80 S. W. (2d) 504.

Such oil, having been declared contraband by the courts, naturally lost its attributes of property; not being property, it was a subject matter with which the courts believed they should not deal. This was the condition of the common law rule upon the subject when the State's confiscation act became effective. It was a matter of general notoriety, of which the courts take judicial knowledge, that at the time of the enactment of the confiscation act there were several million barrels of contraband oil in either earthen or steel storage in the East Texas oil field, the movement of which was prohibited.[4] The enormous quantity of this oil naturally constituted a fire hazard; and the legislature, in addition to its efforts to more effectively carry out the conserva-

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[4] The Federal Courts sitting in Texas have taken judicial knowledge of "the conditions in the East Texas oil fields as to surreptitious and illegal production of oil there." (*Melton* v. *Railroad Commission,* 10 F. Supp. 984-987.) This enormous amount of contraband oil stored in open and steel storage in the East Texas oil field was the result of surreptitious practices engaged in by oil operators in East Texas. This Court long ago considered itself "bound to take notice of public facts and geographical positions" and that certain parts of this country had "been infested at different periods by smugglers" and same was a "matter of general notoriety" and such facts could "be gathered from the public documents of the government." (*The Apollon,* 9 Wheat. 362, 6 L. Ed. 111 (P. 374) per Story, J.)

tion policy of the State by forfeiting it to the State, had to devise some means of disposing of it.

It is submitted that the confiscation act is a valid exercise of the police power and such legislation does not deprive persons holding illegal oil or its products of their property rights therein, without due process of law, nor does it deprive them of the equal protection of the law under the 14th Amendment to the Constitution of the United States. In *Lawton* v. *Steele*, 152 U. S. 132, this Court had under consideration the validity of a New York law which provided for the summary seizure and destruction of boats, fish nets etc. which were used to catch fish out of season. The right of the State of New York was upheld, to provide for the seizure and destruction of these objects—innocent in themselves—when used to violate the laws of the State. This decision is peculiarly applicable to the situation existing in Texas with regard to the production, transportation and handling of illegal oil and its products. Said the court:

> "The legislature, however, undoubtedly possessed the power not only to prohibit the fishing by nets in these waters, but to make it a criminal offense, and to take such measures as were reasonable and necessary to prevent such offenses in the future. It certainly could not do this more effectually than by destroying the means of the offense. * * *"

If the New York Legislature had power to adopt the most effectual means of preventing a violation of its laws which prohibited fishing in closed seasons, which means provided for the destruction of the instruments by which the offense might be committed, why has not Texas the same power to abate the nuisance of illegally produced oil by forfeiture and confiscation?

In *Van Oster* v. *Kansas*, 272 U. S. 465, this Court had under consideration a Kansas law which provided for the

seizure and forfeiture of vehicles used for the illegal transportation of intoxicating liquors. Mr. Justice Stone said:

> "It is not questioned that a state in the exercise of its police power may forfeit property used by its owner in violation of state laws prohibiting the liquor traffic * * * (citing cases). * * * It has long been settled that statutory forfeitures of property entrusted by the innocent owner or lienor to another who uses it in violation of the revenue laws of the United States is not a violation of the due process clause of the 5th Amendment * * * (citing cases). * * * We do not perceive any valid distinction between the application of the 14th Amendment to the exercise of the police power of the state in this particular field, and the application of the 5th Amendment to the similar exercise of the taxing power by the Federal government, or any reason for holding that the one is not as plenary as the other." (P. 467.)

From this holding it is submitted that a sovereign State under the 14th Amendment to the Federal Constitution has as broad a power to forfeit contraband articles handled in violation of its laws as the Federal government may do under its revenue laws. See also *Samuels* v. *McCurdy*, 267 U. S. 188.

The Congress of the United States has provided for the forfeiture of property used to violate the revenue laws, and such enactments have been sustained by this Court. *Henderson's Distilled Spirits*, 14 Wall. 44; *Dobbins Distillery* v. *United States*, 96 U. S. 395; *Goldsmith, Jr.-Grant Co.* v. *United States*, 254 U. S. 505; *Various Items of Personal Property, Waterloo Distilling Co.* v. *United States*, 282 U. S. 577; and *United States* v. *Three Copper Stills*, 47 Fed. 495.

Congressional enactments under the customs laws have been sustained. *Thomas Wood, Jr.*, v. *United States*, 14 Curtis 336, 16 Peters 342.

Vessels used in acts of piracy may be condemned and sold. *The Palmyra,* 12 Wheaton 1.

Ships used to transport aliens into this country contrary to Federal law have been forfeited and sold. *United States* v. *Olsen,* 57 Fed. 579.

Property of a person engaged in acts of treason or rebellion against the sovereign have been confiscated and sold. *Bigelow* v. *Forrest,* 9 Wall. 339.

Police measures adopted, having a reasonable relation to accomplish the end in view, have been sustained by this Court in the following cases:

Adams v. *Milwaukee,* 228 U. S. 572;

Jacob Ruppert v. *Caffey,* 251 U. S. 264;

Upton et al. v. *Felton,* 4 Fed. Supp. 585 (Upholding the statute requiring the owner to destroy red cedars as a public nuisance when growing within two miles of an orchard containing more than 1,000 apple trees and discussing the police power and due process clause);

Ohio Oil Company v. *Conway,* 281 U. S. 146;

Miller v. *Schoene,* 48 S. Ct. Rep. 246;

Chicago & Alton Railroad Co. v. *Tranbarger,* 238 U. S. 67;

Purity Extract Co. v. *Lynch,* 226 U. S. 192 (In which it was held that the State was the judge of the means necessary to make its law effective);

Northwestern Fertilizing Co. v. *Hyde Park,* 97 U. S. 59.

See also:

Robertson Cadillac Motor Co. v. *Ratekin,* Neb. 177 N. W. 339;

Sterrett v. *Gibson,* 168 S. W. 16.

V.

The Bankruptcy Court Has no Jurisdiction to Enforce the Texas Confiscation Act.

Filing of the motion by the State, seeking leave to institute such a confiscation suit in one of its Courts, was the only avenue open to it whereby it could effectually abate the nuisance of illegally produced oil. The State could not, by way of intervention in the Bankruptcy Court, accomplish the results sought to be attained under authority of its confiscation statute, for the reason that the Bankruptcy Court has no jurisdiction to entertain a confiscation suit on behalf of the State seeking forfeiture of the oil, because Article 6066a, Section 10, and cognate amendments under Title 102, Revised Statutes of Texas are penal in the international sense, and are not capable of being enforced in Courts of the United States.

The penalty of forfeiture provided for results from violations of the conservation laws, and is visited upon such violators in vindication of the State's policy in respect of its efforts to conserve its natural resources. Testing the statute by what is said in *Wisconsin* v. *Pelican Insurance Co. of New Orleans,* 127 U. S. 265, no other conclusion can be reached than that Article 6066a and related statutes are penal in the international sense. This decision follows the holding of Chief Justice Marshall in *The Antelope,* 10 Wheat. 66:

> "The courts of no country execute the penal laws of another."

Wisconsin v. *Pelican Insurance Co.* (127 U. S. 265), *supra,* is followed in *Huntington* v. *Attrill,* 146 U. S. 657, where the question of jurisdiction to enforce State penal laws is further discussed, the latter holding that the courts of

the United States have no power to execute the penal laws of the individual States.[5]

VI.

Forfeiture of Offending Property Takes Place at the Time of the Commission of the Unlawful Act.

Section 10 (a), Article 6066a should be construed in the light of the authorities declaring (as respects legislative acts decreeing the forfeiture of contraband articles) that actual forfeiture occurs at the date of the commission of the unlawful act; unlawful oil and unlawful products of oil became forfeit oil immediately upon being produced or handled in violation of law. In *Griswold* v. *The President of the United States,* 82 F. (2d) 922, the Circuit Court of Appeals for the 5th Circuit, in referring to the Texas confiscation act, said that, "Those laws make contraband and *forfeit to the State* oil produced in violation of them" (P. 924) and points out that Sections 10 (a), (b), (c), and (d) provide for the filing of suits *in rem* against unlawful oil and unlawful products "*to enforce the forfeiture.*" Thus, it is claimed that the statutes of the State of Texas dealing with unlawful oil and the decisions of the Courts construing them should be looked upon as working a forfeiture of such oil upon the occasion of its being produced, transported or handled in violation of the conservation laws. This contention is consistent with the holdings of

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[5] Compare *State of Indiana* v. *Alleghany Oil Co.,* 85 F. 870. *Leflar Extra State Enforcement of Penal and Governmental Claims,* 46 Harvard Law Review 193.

Upon this point the Dissenting Judge in the case at bar said:

> "The proceeding to condemn is a special one; it must be followed exactly as provided for by the statute. U. S. *v.* Smelser (C. C. A.) 87 F. (2d) 799; Mingus *v.* Wadley, 115 Tex. 551, 285 S. W. 1084. The bankruptcy court sitting in reorganization is not competent to inquire into or adjudge the condemnation." *State of Texas* v. *Donoghue,* 88 F. (2d) 48. (P. 53.)

the decisions of this Court. In *United States* v. *1960 Bags of Coffee,* 8 Cranch. 398, the question as to the time at which forfeiture actually takes place was definitely decided to be at the time of the commission of the unlawful act or acts and the date of the judgment of condemnation "of such articles relates back to the time of the commission of the offense." In later cases, one of which is *United States* v. *Stowell,* 133 U. S. 1, the Federal courts have held that property forfeited by reason of the crime with which it is connected is not entitled to legal protection. This Court said in the *Stowell* case:

> "By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right of the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed, and the condemnation, when obtained, relates back to that time, *and avoids all intermediate sales and alienations, even to purchasers in good faith.*
>
> "The rule was early applied under statutes enacting that whenever goods, the importation of which was prohibited, should be imported, they should be forfeited; and that if any ship should leave port without clearance or giving bond as required by law, the ship and the cargo should be forfeited. United States *v.* 1960 Bags of Coffee, 12 U. S., 8 Cranch. 398 (3:602); The Mars, 12 U. S. 8 Cranch. 417 (3:609). It has been recognized and acted on in cases of goods imported in fraud of the Customs Laws. Gelston *v.* Hoyt, 16 U. S. 3 Wheat. 246, 311 (4:381, 397); Wood *v.* United States, 41 U. S. 16 Pet. 342, 362 (10:987, 995); Caldwell *v.* United States, 49 U. S. 8 How. 366 (12:1115). And it has been steadfastly upheld under the Internal Revenue Laws; in one case, under an

enactment punishing by fine and imprisonment any person removing distilled spirits from the distillery contrary to law, with intent to evade the payment of the tax thereon, and providing that spirits so removed should be forfeited; and in another case under an enactment that any person fraudulently executing an instrument required by the Internal Revenue Laws should be punished by fine and imprisonment and the property to which the instrument related should be forfeited. Henderson's Distilled Spirits, 81 U. S. 14 Wall. 44 (20:815); Thacher's Distilled Spirits, 103 U. S. 679 (26:535)." (Italics added.)

In *Milam* v. *United States,* 296 Fed. 629-631, it is said:

"Property forfeited by reason of the crime with which it is connected is not entitled to legal protection. A person in possession of forfeited property has no right to the protection of his possession, and such forfeited property is always rightfully subject to seizure on behalf of the government. United States *v.* Stowell, 133 U. S. 19, 10 Sup. Ct. 344, 33 L. Ed. 555; Taylor *v.* United States, 3 How. 197, 205, 11 L. Ed. 559; Boyd *v.* United States (4th Circuit) 286 Fed. 930; United States *v.* Welsh (D. C.) 347 Fed. 239."

It is respectfully submitted that the provisions of the Texas confiscation act should receive the same construction that the congressional enactments received in the above cited cases by this Court.

VII.

The Trustee in Bankruptcy in Dealing With Crude Petroleum Oil in the State of Texas is Subject to and Bound by Valid Laws, Regulating the Handling of Such Commodity.

On May 11, 1935, unlawful oil and unlawful products of oil, by legislative act, were defined by Section 1, Paragraphs (d) and (e) of Article 6066a; on such date the transportation, sale or handling of unlawful oil or unlawful

products of oil was specifically prohibited by statute (Article 6049e). Regardless of whether the confiscation act may be valid or invalid, the Bankruptcy Court and its Trustee are bound by other valid State laws which deal with a subject matter—over which the Trustee assumes to assert title—and which matter is subject to the exercise of the State's police power.

The State and Federal courts have held, regardless of arbitrary action on the part of agents of the Railroad Commission in attempting to enforce the conservation laws, the owner of the same may not sell, transport or otherwise handle unlawful oil; and this prohibition is found in Article 6049e (Acts 1935, 44th Leg., p. 180, ch. 76). The confiscation act and the act prohibiting in any manner the handling of unlawful oil or its products have been recognized as valid enactments in *Griswold* v. *The President of the United States*, 82 F. (2d) 922.

The mere filing of a petition for corporate reorganization under Section 77B could not clothe the Bankruptcy Trustee with any greater rights than the debtor had, respecting the oil in question, at the time of the filing of the petition for reorganization in the Bankruptcy Court. If this oil was and is illegal and its handling inhibited by State statutes, the Bankruptcy Court could not by any of its extraordinary processes compel an administrative agency of the State to grant permission to the Bankruptcy Trustee to transport, sell or otherwise handle the same in such manner as to place it in the channels of commerce. Under the Connally Act [6] (Act of February 22, 1935, c. 18,

[6] By Act of Congress, June 14, 1937, it is provided that:

"Section 13 of the Act entitled 'An Act to regulate interstate and foreign commerce in petroleum and its products by prohibiting the shipment in such commerce of petroleum and its products produced in violation of State law, and for other purposes', approved February 22, 1935 (15 U. S. C. A., Section 715 l) is amended by striking out 'June 16, 1937' and inserting in lieu thereof 'June 30, 1939'."

49 Stat. at Large, p. 30, 15 U. S. C. A. Sections 715-715, 1) the Trustee could not move it interstate. If the oil in question were illegal at the time of the filing of the petition for reorganization by the debtor, the oil would likewise be contraband under the laws of the United States. Sec. 715a, *supra*. For the United States District Court sitting in Bankruptcy to authorize the Trustee in Bankruptcy to move oil declared to be unlawful under the laws of this State would constitute a refusal by such court to give effect to the declared policy of the Congress of the United States, which is to protect interstate and foreign commerce from the burden and harmful effect upon such commerce caused by contraband oil as defined by such act, and also to encourage the conservation of deposits of crude oil situated within the United States.[7]

Moreover, the Trustee is bound to comply with all valid laws of this State, and would have to invoke action of the administrative agencies of the State charged by law with the enforcement of the conservation laws before he would be entitled to move the oil in commerce. This State agency has the authority to pass upon applications of the owners of oil seeking authority to move such oil. If an application should be denied, Section 9 of Article 6066a authorizes a review by a State court which may not overrule the action of the agents of the Railroad Commission unless they have acted unlawfully or arbitrarily.[8] While it is true the Trustee may appeal to the Federal courts having jurisdiction upon the completion of the administrative function by the agents of the Railroad Commission if the jurisdictional

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[7] The present provisions of the Connally Act were enacted by Congress after the decision of *Panama Refining Company* v. *Ryan*, 293 U. S. 388, and do not now contain the infirmities pointed out in that case.

[8] Compare *Railroad Commission* v. *Lacy*, 100 S. W. (2d) 118; *Curtis* v. *Railroad Commission*, 104 S. W. (2d) 905; *Davenport et al.* v. *Railroad Commission*, 85 S. W. (2d) 661, and *Davenport* v. *Railroad Commission*, 89 S. W. (2d) 1006; *Railroad Commission* v. *Morgan*, 92 S. W. (2d) 1131.

requisites are present,[9] yet the Federal courts will not overturn the action of such agency unless it be clearly shown that such agency has violated some right recognizable under the Constitution of the United States. *Panama Refining Company* v. *Railroad Commission,* 16 F. Supp. 289. If no such right is denied, a Federal court, under the 11th Amendment, would be without jurisdiction to enjoin enforcement by the State of its conservation laws by any character of proceeding, whether initiated in a Federal bankruptcy court or in any other Federal tribunal. "The 11th Amendment is an explicit limitation of the judicial power of the United States" * * * and * * * "Such a suit cannot be entertained upon the ground that the controversy arises under the Constitution or laws of the United States" * * * *Missouri* v. *Fiske,* 290 U. S. 18-29 (P. 26).

Whether the proceeding to enjoin the enforcement of the conservation laws of the State against the Trustee in Bankruptcy be directed against the agents of the Commission, the Commission itself, by naming its members, or the State of Texas itself, such suit or proceeding essentially would be one against the sovereign State.

See *Ex parte Ayers,* 123 U. S. 443; *Louisiana* v. *Jumel,* 107 U. S. 711; *Cunningham* v. *Macon & B. Railroad Co.,* 109 U. S. 446; *Hopkins* v. *Clemson Agricultural College,* 221 U. S. 636; *Christian* v. *Atlantic & N. C. R. Co.,* 133 U. S. 233; *Carolina Glass Co.* v. *South Carolina,* 240 U. S. 305; and *Fitts* v. *McGhee,* 172 U. S. 516.

Conclusion.

We submit the Bankruptcy Court should have granted leave to the State of Texas, upon the timely motion of its Attorney General, to proceed in a State Court against the alleged illegal oil; that it should have taken heed of the official representation made by the Attorney General

[9] Compare *Panama Refining Company* v. *Railroad Commission,* 16 F. Supp. 289.

of the State of Texas as to the illegal character of such oil and have permitted him to try out the question of its legality in one of the State's tribunals. If the State should prevail in such suit, it is obvious the Bankruptcy Trustee would have no legal right to the oil in question, for the reason there inured to the Trustee in Bankruptcy only those rights the debtor itself had at the time of the filing of the petition for corporate reorganization. Again, in such a proceeding for confiscation in a State Court should judgment go against the State, the latter would then have had its day in Court, and the rights of the debtor and its Trustee to the oil would have been vindicated.

WHEREFORE, it is submitted to the Court that the decision below should be reversed.

Respectfully submitted,

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APPENDIX "A".

Art. 6049e. Definitions.

SEC. 1. Unless the context otherwise requires, the words defined in this Section shall have the following meaning when used in this Act, to-wit: "Commission" means the Railroad Commission of Texas. "Person" means any natural person, corporation, association, partnership, receiver, trustee, guardian, executor, administrator and a fiduciary or representative of any kind. The word "pool" means an underground reservoir containing a connected accumulation of crude petroleum oil, or natural gas, or both. The words "crude petroleum oil," "crude petroleum," "crude oil," and "oil" mean the same thing whether used in this Act or elsewhere in the conservation Statutes of this State relating to oil and gas. The words "natural gas" and "gas" mean the same thing whether used in this Act or elsewhere in the conservation Statutes of this State relating to oil and gas. The words "product" or "product of crude petroleum oil or natural gas" mean any commodity or thing made or manufactured from crude petroleum oil or natural gas, and all derivatives or by-products of crude petroleum oil or natural gas, including refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, treated crude oil, fuel oil, residuum, gas oil, naphtha, distillate, gasoline, kerosene, benzine, wash oil, waste oil, lubricating oil, casinghead gas, casinghead gasoline, blended gasoline, and blends or mixtures of crude petroleum oil, or natural gas, or any derivatives or by-products thereof.

Newspaper Publication of Rules, Regulations or Orders of Commission.

SEC. 8. The publication in any newspaper of any rule, regulation or order of the Commission shall not be required before such rule, regulation, or order shall become effective for any purpose except as may be required for the enforcement of the criminal provisions of Chapter 165, Acts of the

Forty-third Legislature, Regular Session, or any amendment thereof.[10]

Prohibition of Purchase, Acquisition or Sale in Violation of Statute.

SEC. 10. The purchase, acquisition, or sale, or the transportation, refining, processing, or handling in any other way, of crude petroleum oil or natural gas, produced in whole or in part in violation of any oil or gas conservation Statute of this State or of any rule, regulation or order of the Commission thereunder, is hereby prohibited.

The purchase, acquisition, or sale, or the transportation, refining, processing, or handling in any other way, of any product of crude petroleum oil or natural gas which product is derived in whole or in part from any crude petroleum oil or natural gas or any product of either, which crude petroleum oil or natural gas or product was in whole or in part produced, purchased, acquired, sold, transported, refined, processed, or handled in any other way, in violation of any oil or gas conservation Statute of this State, or of any rule, regulation or order of the Commission thereunder, is hereby prohibited.

The Commission shall have the power to promulgate and enforce such rules, regulations and orders as may be necessary to carry the provisions of this Section into effect and to prevent a violation thereof; provided that whenever the Commission requires a showing that refined products were manufactured from oil legally produced, such requirement shall be of uniform application throughout the State; and provided that whenever such rule, regulation or order is promulgated for the purpose of controlling any condition in any local area or to prevent a violation in any local area, then upon the complaint of any person that the same or similar conditions exist in some other local area and the promulgation and enforcement of such rule could be beneficially applied to such additional area, the Commission shall determine whether or not such conditions do exist, and if it be shown that they do, then such rule, regu-

[10] Vernon's Rev. Pen. Code, art. 1112b.

lation or order shall be enlarged to include such additional area.

None of the provisions of this Section shall apply to the purchase of any products of crude petroleum when made by the ultimate consumer from a retail distributor thereof.

Commission Through Attorney General Authorized to Restrain by Suit Violation, Jurisdiction of Suits.

SEC. 13. Whenever it shall appear that any person is violating or threatening to violate any provision of this Act, or of Title 102 of the Revised Civil Statutes of Texas, 1925, as amended, or of any rule, regulation or order of the Commission promulgated thereunder, the Commission, through the Attorney General, shall bring suit in the name of the State of Texas against such person in any Court of competent jurisdiction in Travis County, or in the county of the residence of the defendant or, if there be more than one defendant, in the county of the residence of any of them, or in the county in which such violation is alleged to have occurred, to restrain such person from violating such Statute or such rule, regulation, or order of the Commission, or any part thereof; and in such suit the Commission in the name of the State of Texas may obtain such injunctions, prohibitory and mandatory, including temporary restraining orders and temporary injunctions, as the facts may warrant.

The violation by any person of any injunction granted under the provisions of this Section shall be sufficient grounds for the appointment by the Court, either upon its own motion or that of the Commission in the name of the State of Texas, of a receiver to take charge of such properties of such person, and to exercise such powers as in the judgment of the Court shall be necessary in order to bring about compliance with such injunction; provided, however, that no such receiver shall be appointed except after notice and hearing. The power to appoint a receiver as herein provided shall be in addition to and cumulative of the power to punish for contempt.

Act Cumulative.

SEC. 16. This Act shall be cumulative of all laws of the State of Texas, not inconsistent herewith and not hereby expressly repealed or amended.

Repeals, Penalties and Pending Prosecutions Not Affected.

SEC. 17. Articles 6007, 6009, 6011, and 6017 of the Revised Civil Statutes of Texas, 1925; Section 6, Chapter 313, Acts of the Forty-first Legislature, Regular Session;[11] Sections 4 and 6, Chapter 26, Acts of the Forty-second Legislature, First Called Session;[12] Section 14, Chapter 2, Acts of the Forty-second Legislature, Fourth Called Session;[13] and Section 1, Chapter 64, Acts of the Forty-third Legislature, Third Called Session,[14] are hereby repealed. All other laws and parts of laws in conflict or inconsistent with any of the provisions of this Act are hereby repealed. No violation committed and no liability, penalty or forfeiture, incurred prior to the time when any Statute, or part thereof, repealed or altered by the provisions of this Act, shall be discharged or affected by such repeal or alteration; but prosecutions and suits for such violations, liabilities, penalties and forfeitures, shall be instituted and proceeded with in all respects as if such prior Statute, or part thereof, had not been repealed or altered, except that where the mode of procedure or matters of practice have been changed by the provisions of this Act, the procedure had after this Act shall have taken effect in such prosecution or suit shall be, as far as is practicable, in accordance with the provisions of this Act. The amendment, repeal or expiration of a rule, regulation or order of the Commission, made or promulgated under the provisions of this Act, or of Title 102, Revised Civil Statutes of Texas, 1925, as amended, shall not have the effect of releasing or discharging any per-

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[11] Article 6036b.

[12] Article 6049c, paragraphs 4 and 6.

[13] Article 6049d, paragraph 14.

[14] Article 6049c, paragraph 14.

son violating said rule, regulation or order prior to the effective date of such amendment, repeal, or expiration from any liability, penalty, or forfeiture incurred prior to such effective date; but prosecutions and suits for such violations, liabilities, penalties, or forfeitures shall be instituted and proceeded with in all respects as if such rule, regulation or order had not been amended, or repealed, or had not expired.

Acts Saved From Repeal.

SEC. 18. Nothing in this Act shall be construed to repeal Chapter 36, Acts of the Forty-first Legislature, Fifth Called Session, known as the "Common Purchaser Act," and the amendments thereto,[15] except as specifically repealed hereby or inconsistent herewith; and this Act shall not be construed to repeal or modify Chapter 97, Acts of the Forty-third Legislature, Regular Session, known as the "Marginal Well Act."[16]

Anti-trust Laws Unaffected.

SEC. 19. It is especially provided that nothing herein shall in any manner affect, alter, diminish, change or modify the anti-trust and/or monopoly Statutes of this State, and that no provision of this Act shall in any manner directly or indirectly authorize a violation of such anti-trust and/or monopoly Statutes, and in this connection it is hereby declared and especially provided by the Legislature of the State of Texas enacting this legislation that notwithstanding the provisions of any other sections of this Act, it is the legislative intent that no provision of this Act shall in any manner affect, alter, diminish or amend any provision of the anti-trust and/or monopoly Statutes of this State, or in any manner authorize a violation of such anti-trust and/or monopoly Statutes; and it is further especially provided that if any provision of this Act shall be so construed by any Court of this State as to in any manner affect, alter, diminish, or modify any provision of the anti-trust and/or monopoly Statutes of this State, then in that event any such

[15] Article 6049a.

[16] Article 6049b.

section, sub-section, sentence, or clause or any provision of this Act so construed as conflicting with said monopoly and/or anti-trust Statutes, is hereby declared null and void rather than the anti-trust and/or monopoly Statutes of this State. The legislative intent herein expressed is to prevail and take precedence over the provisions of any other section or sections of this Act, regardless of any statement therein to the contrary.

Effective Period.

SEC. 20. The provisions of this Act shall end and terminate September 1, 1939. (As amended Acts 1937, 45th Leg., H. B. #9, Par. 1.)

Partial Invalidity.

SEC. 21. If any section, portion, clause or part of this Act be invalid or unconstitutional, the same shall not affect any remaining parts of this Act and it is expressly hereby declared that the Legislature would have passed such remaining parts of this Act with such invalid or unconstitutional section, portion, clause or part omitted. (Acts 1935, 44th Leg., p. 180, ch. 76.)

Effective April 13, 1935.

APPENDIX "B".

Art. 6066a. Regulation of Transportation of Oil or Products Thereof; Definition of Terms.

SEC. 1. (a) The word "Commission" shall mean the Railroad Commission of Texas. The phrase "order of the Commission" shall include any rule, regulation or order adopted by the Railroad Commission of Texas pursuant to the oil and gas conservation statutes of this State, including all provisions of Title 102 of the Revised Civil Statutes of Texas of 1925 and all amendments thereto.

(b) The word "oil" or phrase "crude oil" herein used shall include crude petroleum oil in its natural state as

produced and crude petroleum oil from which only the basic sediment and water have been removed. The word "gas" herein used shall include natural gas, bradenhead gas, casinghead gas, and gas produced from an oil or gas well.

(c) The word "product" shall include refined crude oil, crude tops, topped crude, processed crude petroleum, residue from crude petroleum, cracking stock, uncracked fuel oil, fuel oil, treated crude oil, residuum, gas oil, casinghead gasoline, natural gas gasoline, naphtha, distillate, gasoline, kerosene, benzine, wash oil, waste oil, blended gasoline, lubricating oil, blends or mixtures of petroleum and/or any and all liquid products or by-products derived from crude petroleum oil or gas, whether hereinabove enumerated or not.

(d) "Unlawful oil," as that term is used herein, shall include oil which has been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the Commission, and oil which has been produced within said State in violation of any law of said State or in violation of any order of the Commission, and shall include any oil transported in violation of any such law or in violation of any such order.

(e) "Unlawful product" shall be construed to include any product any part of which was processed or derived in whole or in part from unlawful oil or from any product of unlawful oil, or from unlawful gas, or which is transported in violation of any order of the Commission or in violation of any law of Texas.

(f) "Unlawful gas" shall be construed to include gas produced or transported in violation of any order of the Commission or so produced or transported in violation of any law of Texas.

(g) The word "tender" shall mean a permit or certificate of clearance for the transportation of oil or products approved and issued or registered under the authority of the Commission.

The form of any tender and the application therefor shall be prescribed by order of the Commission and shall

show the name and address of the shipper or person tendering oil or products for transportation, name and address of the transporting agency (where such order requires the transporter to be designated), quantity and true classification of each commodity authorized to be transported, place or places where delivery will be made to the transporting agency, and such other related data as may be prescribed by order of the Commission. A tender shall bear a date and serial number, shall show its expiration date, and shall be executed by the agent or agents authorized by the Commission to deny, approve or register tenders. No tender shall be approved or registered by such agent authorizing the shipment or transportation of any unlawful oil or unlawful product.

(h) The word "manifest" shall be construed to include any document issued by a shipper covering oil or products to be transported by truck or other motor vehicle.

The form of a manifest may be prescribed by order of the Commission, and shall bear a certificate signed by the shipper stating the amount of oil or products and each of them to be transported. A manifest shall show, when required by order of the Commission, the date and serial number of the tender, if a tender is required, authorizing such transportation, or any seal or number or other evidence of such tender, the amount and classification of each such product to be transported, the name and address of the transporting agency, name and address of shipper, name and address of consignee, if known, the name and address of the driver or operator of such truck or vehicle; the number on the license plate on such truck or vehicle; the day, hour and place where such truck or vehicle was loaded and the destination, if known, of such load, and such other related data as may be required by order of the Commission. If the form of manifest is not prescribed by order of the Commission, each shipper required to issue a manifest to a transporter shall utilize the form of manifest commonly used in commercial transactions or the form of manifest required by any State agency or Department of this State to accompany the movement of gasoline.

(i) The word "person" shall include natural person, corporation, association, partnership, receiver, trustee, guardian, executor, administrator, or representative of any kind.

(j) The phrase "shipping papers" shall be construed to include bills of lading covering oil or products transported by railway, manifest covering oil or products transported by truck or motor vehicle, and any written document covering oil or products transported by pipe line, boat or barge. The phrase "delivery ticket" shall be construed to include any expense bill or written document covering oil or products delivered.

Transportation; Regulations.

SEC. 2. (a) Whenever, by order of the Commission, a tender is required before oil or products may be transported, and whenever pursuant to such order, an agent of the Commission approves and issues or registers a tender authorizing the transportation of oil or products by trucks or motor vehicles, it shall be the duty of the person obtaining such tender to sign and issue a manifest to the operator of each such truck or motor vehicle, which manifest shall show the date and serial number of the tender authorizing such transportation; a separate manifest shall be issued for each load carried by such truck or motor vehicle. The person obtaining such tender shall not transport or deliver or cause or permit to be transported or delivered any more nor any different commodity than is authorized by such tender. Each transporter authorized to transport oil or products on a manifest issued by a shipper shall not receive for transportation any different commodity than is described in such manifest and shall not receive oil or products in excess of the amount authorized by such manifest. The person authorized to transport oil or products by a manifest issued by a shipper, which manifest bears on its face the date and serial number of such tender, may rely upon the manifest delivered to him, and each consignee or person to whom oil or a product covered by such manifest is delivered by such transporter may rely upon such mani-

fest as authority for receiving the commodity delivered, provided such manifest appears to be valid on its face, is signed by the shipper, and bears the certificate of the shipper that the transportation of such oil or products is authorized by the tender the date and serial number of which is shown on such manifest.

(b) Whenever, pursuant to any order of the Commission, the transportation of oil or products by truck or motor vehicle is prohibited without a manifest showing the date and serial number of a tender authorizing such transportation, it shall be unlawful for any person to transport by truck or motor vehicle any oil or products without having or carrying in such truck or vehicle at all times between the point of origin and point of destination of such shipment a manifest bearing the date and serial number of the tender authorizing such transportation; and it shall be unlawful for any person to ship or transport or cause to be shipped or transported by truck or motor vehicle any oil or product without furnishing the operator of such truck or motor vehicle a manifest bearing the date and serial number of such tender, authorizing such shipment or transportation; provided, if the person to whom such tender is issued is the operator of such truck or motor vehicle and such tender identifies the truck or motor vehicle by license number and covers one load, such tender in lieu of a manifest may be carried in said truck or vehicle. Products shipped or transported in violation of this Section shall be deemed to be unlawful products. Oil shipped or transported in violation of this Section shall be deemed to be unlawful oil.

(c) It shall be the duty of every person who transports any oil or products by truck or motor vehicle, under conditions that require a tender or manifest as herein provided, to secure from each person to whom any part of such oil or products is delivered a receipt upon the reverse side of said tender or manifest, which receipt shall contain the number of gallons of oil and of each product delivered, the date of delivery and the signature and address of the purchaser or consignee of said oil or products. It shall be the duty of every person who transports any oil or products by truck or motor vehicle and makes deliveries thereof

to keep in this State for a period of two (2) years every such tender or manifest issued to him, together with the receipts and endorsements thereon. Such tenders or manifests shall at all times be subject to the inspection of the Commission, its agents and inspectors.

Arrests for Unlawful Transportation.

SEC. 3. In order to enforce the provisions of this Act every agent of the Commission, Highway patrolman, sheriff, constable and all peace officers of this State are empowered to stop any motor vehicle which may appear to be transporting oil or products, for the purpose of taking samples of the cargo and inspecting the shipping papers of such motor vehicle, provided such agent or officer shall have probable cause and reasonable grounds to believe that such vehicle is transporting any unlawful oil or unlawful products. If upon examination of such motor vehicle it is found that the same is transporting any unlawful oil or unlawful product, or is transporting any oil or product without authority of a tender required by order of the Commission, such authorized agent or officer shall, with or without warrant, arrest the driver thereof and carry him before the nearest Justice of the Peace and file a complaint under this Act against such driver. In any criminal action involving the provisions of this Act, no fee shall be allowed any such agent, patrolman, sheriff, constable or other officer for executing any warrant of arrest or *capias* or for making any arrest with or without a warrant.

Fines or Penalties.

SEC. 4. (a) Every person who transports by truck or motor vehicle, oil or products, who shall wilfully and knowingly fail to stop such truck or vehicle, when commanded to do so by any agent of the Commission or by any authorized officer or who shall wilfully fail to permit inspection by such agent or officer of the contents of or the shipping papers accompanying such truck or vehicle, shall be punished by a fine of not less than Fifty Dollars ($50) nor more than Two Hundred Dollars ($200).

(b) Every person who shall knowingly violate any provision of Section two (2) of this Act, or who shall knowingly ship or transport or cause to be shipped or transported by truck or motor vehicle over any public highway, in this State any unlawful oil or unlawful product, or who shall knowingly ship or transport or cause to be shipped or transported by truck or motor vehicle any oil or product without authority of a tender whenever a tender is required by any order of the Commission, or who shall knowingly receive from any truck or motor vehicle or knowingly deliver to any truck or motor vehicle any oil or product not covered by a tender authorizing the transportation thereof whenever a tender is required by any order of the Commission, shall be punished by a fine of not less than Fifty Dollars ($50) nor more than Two Hundred Dollars ($200).

(c) Whenever by order of the Commission a tender is required before oil or products may be transported or received for transportation by pipe line, railroad, boat or barge, and whenever pursuant to such order an authorized agent of the Commission approves or registers and issues to an initial transporter by pipe line, railroad, boat or barge a tender covering oil or products, such initial transporter may deliver to any connecting carrier or consignee the amount of oil or products covered by such tender, but shall not transport or deliver any more nor any different commodity than is authorized by such tender. Whenever such order provides that connecting carriers or consignees may rely upon the shipping papers executed by such initial transporter as authority to transport or receive the oil or products covered by such shipping papers provided such shipping papers show the date and serial number of the tender issued to the initial transporter, each such connecting carrier receiving oil or products from another transporter by pipe line, railroad, boat or barge, and each consignee receiving oil or products by pipe line, railroad, boat or barge under authority of shipping papers bearing the date and serial number of a tender issued to an initial transporter shall be deemed to be receiving such oil or

products by authority of a tender under the provisions of this Act.

(d) Every person who shall knowingly ship or transport or cause or permit to be shipped or transported by pipe line, railroad, boat or barge any unlawful product or unlawful oil, or who shall knowingly receive or deliver for transportation by pipe line, rail, boat or barge any unlawful product or unlawful oil, or who shall knowingly ship or transport or cause or permit to be shipped or transported by pipe line, rail, boat or barge oil or any product without authority of a tender whenever a tender is required by any order of the Commission, or who shall knowingly receive or deliver by pipe line, rail, boat or barge oil or any product without authority of a tender whenever a tender is required by any order of the Commission, shall be punished by a fine of not less than Fifty Dollars ($50) nor more than Two Hundred Dollars ($200).

Promulgation of Regulations Prior to Enforcement, Except as to Civil Actions.

SEC. 5. Whenever the Commission shall have adopted, after notice and hearing as provided under other statutes of the State, any rule, regulation or order pursuant to any statute of this State, no criminal action shall be maintained against any person involving the violation of any provision of such rule, regulation or order, until the Commission shall have promulgated such rule, regulation or order by publishing a complete copy of same in three (3) newspapers of general circulation in the State of Texas (such newspapers to be selected by said Commission) once each day for three (3) consecutive days, and on and after the seventh (7th) day after the date of the last publication such rule, regulation or order shall be effective and enforceable, in any criminal action, brought pursuant to this Act. No criminal action shall be maintained against any person involving the violation of any provisions of any amendment or modification of any order of the Commission until the Commission shall have promulgated such amendment or modification after its adoption by publish-

ing a complete copy of such amended or modified rule, regulation or order in three (3) newspapers of general circulation once each day for three (3) consecutive days, and, on and after the seventh (7th) calendar day of the last publication, such amendment or modification of such rule, regulation or order shall become effective and enforceable in any criminal action brought pursuant to this Act. However, the absence of promulgation by publication as herein provided shall not affect the enforcement of any order of the Commission in any civil or quasi civil action brought pursuant to this Act or to any statute of this State.

Certificate of Promulgation as Prima Facie Evidence.

SEC. 6. A certificate under the seal of the Commission executed by any member or the Secretary thereof, setting forth the terms of any order of the Commission and that it has been adopted, promulgated and published and was in effect at any date or during any period specified in such certificate shall be prima facie evidence of all such facts, and such certificate shall be admitted in evidence in any action, civil or criminal, involving such order and the publication thereof without further proof of such promulgation, adoption or publication and without further proof of its contents.

State Rangers Authorized to Serve Process.

SEC. 7. In all prosecutions, criminal actions, cases, proceedings or suits involving the enforcement of the provisions of this Act or of any order of the Commission all State Rangers and all agents of the Commission shall have the power and authority to serve any criminal or judicial process, warrant, subpœna or writ just the same and as fully as any sheriff, constable or peace officer is authorized under existing laws when so directed by the court issuing such process. Such rangers and such agents of the Commission may serve such process, warrant and subpœna anywhere within the State of Texas although it may be directed to any sheriff or constable of a particular county. They shall make the same return as any other officer, sign their name and add

thereunder the title of (in the case of a State Ranger) "State Ranger," and (in the case of an agent of the Commission) the words "Agent, Railroad Commission of Texas," which shall be sufficient to make it valid if the writ is otherwise properly made out. No fees of any kind for such services shall be allowed such State Rangers or agents of the Railroad Commission other than their regular salary or compensation.

Pleading, Proof and Venue.

SEC. 8. (a) In any complaint, information or indictment alleging a violation of an order of the Commission, it shall not be necessary to set forth fully the terms of such order, and it shall be sufficient therein to allege the substance of the order, or the pertinent term or terms thereof alleged to have been violated.

(b) In any criminal action filed pursuant to this Act, a certificate executed by any member of the Commission or by the Secretary thereof, showing the amount of allowable oil which may be produced per day or during a stated period from any oil well or wells, proof of any production from which is involved in such criminal action, shall be admissible in evidence and shall be prima facie evidence of the facts therein stated.

(c) The venue of a criminal action maintained pursuant to this Act is hereby fixed in the county where the oil or products involved in such criminal action is received or delivered, or in any county in or through which such oil or product is transported.

(d) Nothing herein shall restrict or limit the power of the Commission to adopt rules, regulations or orders pursuant to the oil and gas conservation statutes of this State including all provisions of Title 102 of the Revised Civil Statutes of Texas of 1925 and all amendments thereto.

Review of Rejection of Tender.

SEC. 9. Whenever an application for a tender is rejected by an authorized agent of the Commission, it shall be the

duty of such agent to return one copy of such application to the applicant endorsing thereon all the reasons for such rejection. Such applicant whose tender may be rejected shall have the right to appeal from any action of such agent by filing a petition in the District Court of Travis County, Texas, against the Commission, for a review of the ruling of such agent. The Court hearing such petition shall have the power to sustain, modify or overrule any action of such agent relative to a tender application and to issue such restraining orders or injunctions as the facts may warrant. It shall be the duty of the Clerk of the Court wherein such petition is filed to issue to the Commission a notice setting forth briefly the cause of action stated in such petition. But the Court shall not enter any order on any such petition until after a hearing thereon to be heard not less than five (5) days from the issuance of such notice. Any person whose application for tender is not acted on within twenty (20) days from the date of its filing shall have the right of appeal in the same manner above provided for appealing from a rejection of a tender application. Any person dissatisfied with the decision of the District Court may appeal to the Court of Civil Appeals.

Forfeiture of Unlawful Products; Attorney General Duties.

SEC. 10. (a) All unlawful oil and unlawful products, regardless of the date of production or manufacture thereof, are hereby declared to be a nuisance and shall be forfeited to the State as hereinafter provided. It shall be the duty of the Commission, its servants, agents, and employees, highway patrolmen, sheriffs, constables, and peace officers, upon the discovery of any unlawful oil or unlawful products, to file immediately with the Attorney General of Texas, a report giving a description of such unlawful oil and/or unlawful products, including the ownership, party in possession, the amount, the location and classification thereof.

(b) When the Attorney General is advised from any source of the presence and existence of unlawful oil and/or

unlawful products it shall be his duty to institute a suit *in rem* against such unlawful oil and/or unlawful product and against all persons owning, claiming, or in possession thereof, such suit to be brought in the name of the State of Texas in any court of competent jurisdiction in Travis County or in the county in which such oil or product is located. If it shall appear to the court from an examination of the petition or after hearing evidence thereon at a preliminary hearing that unlawful oil and/or unlawful products mentioned in the petition are in danger of being removed, wasted, lost, or destroyed, the court is authorized and required, in term time or in vacation, to issue restraining orders or injunctive relief, either mandatory or prohibitive, or to appoint a receiver to take charge of the oil or product in question, or to direct the sheriff of the county in which the unlawful oil or unlawful products are located to seize and impound the same until further orders of the court.

(c) Notice of pendency of such suit shall be served in the manner prescribed by law; either party to said suit may demand a trial by jury on any issue of fact raised by the pleadings and the case shall proceed to trial as other civil cases. If, upon the trial of such suit the oil or product in controversy is found to be unlawful oil or unlawful products, then the court trying said cause shall render judgment forfeiting the same to the State of Texas and authorizing the issuance of an order of sale directed to the sheriff or any constable of the county where the oil or products are located commanding such officer to seize and sell said property in the same manner as personal property is sold under execution. The court may order the oil or products sold in whole or in part as may be deemed proper and the sale shall be conducted at the court house door of the county where the oil and/or products are located and shall conform in all respects to the sale of personal property as aforesaid. The money realized from the sale of any such unlawful oil and/or products shall be applied, first, to the payment of the costs of suit and expenses incident to the sale of such oil and/or products after such expenses have been approved and allowed by the court try-

ing the case, and all funds then remaining, shall be remitted forthwith to the State Treasurer and shall be by the Treasurer placed to the credit of the General Revenue Fund of the State of Texas.

(d) The officers of said Court shall receive the same fees provided by law for other civil actions. Provided further that the Sheriff executing said sale shall issue a bill of sale or certificate to the purchaser of said oil and/or products and the Commission shall, upon the presentation of said certificate of clearance, issue a tender, if a tender is required, permitting the purchaser of said oil and/or products to move the same into commerce.

Provisions Cumulative.

SEC. 11. The provisions of this Act shall be cumulative of all other provisions of the Civil Statutes, the Penal Code and the Code of Criminal Procedure, and the remedies herein provided shall be cumulative of all other remedies provided in the Civil Statutes, the Penal Code and the Code of Criminal Procedure.

Partial Invalidity.

SEC. 12. It is hereby declared to be the legislative intent to enact each separate provision of this Act independent of all other provisions, and the fact that any section, word, clause, sentence or part of this Act shall be declared unconstitutional shall in no event affect any other section, word, clause, sentence or part thereof.

Exception as to Retail Purchases.

SEC. 13. The provisions of this Act shall not apply to the retail purchase of the products of petroleum where such products so purchased at retail are contained in the ordinary equipment of a motor vehicle and are used only for the operation of such motor vehicle in which contained. (Acts 1935, 44th Leg., p. 624, ch. 246.)

Effective May 12, 1935.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 28

THE STATE OF TEXAS, AND J. C. CLOPTON AND BULLOCK HYDER, RECEIVERS,
Petitioners,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR,
Respondent.

SUPPLEMENTAL AND REPLY BRIEF FOR THE STATE OF TEXAS.

WILLIAM MCCRAW,
Attorney General of Texas;
W. J. HOLT,
Assistant Attorney General;
WILLIAM C. DAVIS,
Assistant Attorney General;
CHARLES M. KENNEDY,
Assistant Attorney General;
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SUPPLEMENTAL AND REPLY BRIEF FOR THE STATE OF TEXAS.

STATEMENT

Proposition No. 1 upon which the respondent relies is to the effect that the Circuit Court of Appeals did not err in holding that the oil which the State seeks to confiscate is not a nuisance *per se*, that the title to it was in the debtor at the time the Petition for Reorganization was filed, and that it passed to

and is held by the Trustee as a part of the debtor's estate. This holding by the Circuit Court of Appeals (R. 118-119), which respondent claims supports his Proposition No. 1, is based upon neither reason nor authority. Moreover, as has been demonstrated by the various authorities cited and discussed in the argument supporting the validity of the State's confiscation act (Sec. 10, Article 6066a), (State's Brief, pp. 14 to 18), that the contention is without merit.

We assert that the proper answer to this contention is that, regardless of the fact that the Circuit Court held that the oil was not a nuisance *per se*, (R. 158), or that the same passed to the Trustee as part of the debtor's estate, (and to this the State does not agree), the basic issue and the State's principal grievance is that the Bankruptcy Court should have recognized the official representation made to it by the Attorney General of Texas that the oil was and is illegal, and that since the Bankruptcy Court has no jurisdiction to condemn the oil and adjudge a forfeiture of the same to the State, the State of Texas should have been granted leave to test that question in a state court as provided by statute. That this is the primary issue is demonstrated by the language of the dissenting Judge (R. 124):

> "The bankruptcy court sitting in reorganization is not competent to inquire into or adjudge the condemnation. The result of the court's order in refusing permission to proceed, if effective to prevent the State's first proceeding, would be that the reorganization would proceed on the as-

sumption that the oil was the debtor's property only to have that assumption disappear if in a condemnation suit filed after reorganization judgment went for the state. For it is perfectly plain that a proceeding in which the question of whether the property is to be forfeited may not be tried and decided, cannot effect that question. * * * I think the State did the seemly thing in applying for permission, and that permission should have been granted as matter of course. If the oil is condemned while the property is still in the custody of the reorganization court, certainly that court can be depended upon in the exercise of the comity due between courts to surrender it on the State's writ for sale as the statute requires." (See also Authorities cited on pp. 19 to 25 of State's Brief.)

On page 5 of respondent's brief it is agreed that the State's confiscation act is penal in the international sense, and that the Bankruptcy Court is without jurisdiction to enforce it or to move in aid of it. This being true, it is argued that, it is the duty of the Bankruptcy Court to retain possession of the oil; and for the Bankruptcy Court to deliver possession of the oil to the State would be a plain violation of the rule "the courts of no country execute the penal laws of another," and for the Bankruptcy Court to grant the State's request to take proceedings for the confiscation of the oil would be to recognize and assist in the enforcement of the State's penal statute. To follow the reasoning submitted by the respondent would amount to a total disregard of the declared policy of the Congress of the United States exemplified in the so-called Connally Hot Oil Act,

effective February 22, 1935 (15 U. S. C. A., Sec. 715 et seq.), and the judicial interpretations placed thereon by the courts of the United States (See footnote 6, page 23 of State's brief).

In *Ryan v. Amazon Petroleum Company, a corporation, et al.*, 71 Fed. (2d) 1, after discussing certain phases of Section 9c, (15 U. S. C. A., Section 709c), later stricken down by this court, (Panama Refining Company v. Ryan, 293 U. S. 388) the Circuit Court of Appeals, after referring to the oil proration laws of the State, says:

> "The regulation of production is assumed to have been validly made by the state, and the federal regulation is actually only of interstate and foreign commerce adjusted to aid and not to thwart the state action. Such cooperation between state and central government is not constitutionally wrong, but right and desirable. The central government was not created to be an opponent and a rival of the state governments, but to be a supplement and a protection to them. Its enumerated powers, although supreme and sometimes exercised to the dissatisfaction of some states, *are not misused when by a happy concord of duty these governments can cooperate.*" (Italics added.)

Regarding this principle of law, the same Circuit Court of Appeals in *Griswold* v. *The President of the United States*, 82 Fed. (2d) 922, on the assumption that there were no infirmities in the particular act under examination, declared:

"We, on full consideration, held that Congress could validly prohibit transportation in interstate commerce of oil which state laws have made contraband. *We approve and reaffirm that holding.* We think appellant's arguments disregard the verities, the realities of the situation as it exists in law and in fact." (Italics added.)

The same Court in the case of *Thompson et al.* v. *Spear et al.*, 91 Fed. (2d) 430, after discussing the provisions of the State's confiscation act (Sec. 10, Article 6066a), and the so-called Connally Hot Oil Act (15 U. S. C. A., Sec. 715 *et seq.*), points out:

"The two agencies (State and Federal) began to function and as a result of the more stringent provisions of the two acts, as well as the *cooperative efforts of the two agencies* many cases were made for injunctions, forfeitures and criminal prosecutions, so that in a comparatively short time *orderly government* replaced chaotic disorder" (Italics added).

Subsection (b) of Section 10 of the so-called confiscation law of the State of Texas provides that, when the Attorney General is advised from any source of the presence and existence of unlawful oil and/or unlawful products, it shall be his duty to institute a suit *in rem* against such unlawful oil and/or unlawful products and against all persons owning, claiming or in possession thereof; such suit to be brought in the name of the State of Texas in any

court of competent jurisdiction in Travis County or in the county in which the oil or products is located.

The Bankruptcy Court was officially advised that the Attorney General of Texas was possessed of knowledge of the presence and existence of unlawful oil and unlawful products of oil, and but for the injunctions issued by the Bankruptcy Court directed against all persons, restraining interference with its Trustee (R. 52-53), the Attorney General would have undertaken to carry out the mandatory duty imposed upon him by statute to proceed against the alleged illegal oil question. The first step in the proceeding in the attempted abatement of the alleged nuisance was begun when the Attorney General became advised of the existence of such oil claimed to be illegal. The second step to accomplish that result was interrupted by the several injunctions issue by the Bankruptcy Court. It was then that the Attorney General officially advised the Bankruptcy Court of the illegal character of the oil and also sought permission to take proceedings for its abatement. The law of the State of Texas thus started to function. The oil had already become stigmatized as a nuisance and it was subject to abatement by the procedure provided in Section 10, Article 6066a, whereby judgment of condemnation could be secured evidencing its forfeiture to the State. The oil in question came into the hands of the Bankruptcy Trustee burdened with whatever infirmities it may have had in the hands of the debtor before it sought reorganization in the Bankruptcy Court.

To illustrate the point, we say that many states of the Union during the Prohibition Era had laws providing for the forfeiture of automobiles and other instruments used in the unlawful possession, transportation and handling of intoxicating liquors. As we recall, it was never contended that an automobile or any other vehicle in those days was considered as a nuisance per se, but by the misuse of such instruments they became forfeited to the sovereign. Many of the laws provided that, when persons were apprehended while transporting or secreting illegal liquors, the vehicles used were subject to seizure by the law enforcement officers; the laws provided that the same should be proceeded against with a view to having such instruments forfeited by reason of the unlawful acts connected with their use. Could it be said that an owner of a vehicle used in violating such laws could go into bankruptcy and frustrate valid state action looking to the suppression of such nuisances created by the handling of illegal liquors? Such is substantially the situation confronting the Attorney General of Texas in the instant cause. We believe that the mere filing of the petition for reorganization by the debtor and the drawing of the oil in question into the custody of the Bankruptcy Court could in no manner remove the asserted taint of illegality from the oil any more than a corporation dealing in intoxicating liquors could remove same from the lawful operation and consequences of valid state laws regulating same by going into a bankruptcy court.

Radford v. *Thornell*, (Sup. Ct., Iowa) 81 Iowa 709, 45 N. W. 890, is illustrative of the point attempted to be made. We quote:

> "There is nothing in the spirit or policy of the bankrupt law evidencing a purpose to exempt the property of a bankrupt estate from the operation of the state laws for governmental purposes in common with other property of the state, either by the imposition of burdens or the restraints of use; nor does the law evince a purpose to divest the state courts of authority to give force and effect to the law for such purposes.
>
> * * *
>
> "It cannot be that it is the policy of the bankrupt law to interfere with the laws of a state for the regulation or control of property, as against unlawful use, nor with the courts of the state, in the application of such laws. If, in the application of the law, the property of a bankrupt estate becomes burdened with assessments because of its misuse, they should be treated by the federal courts as other legal assessments are."

Carrying our illustration further, let it be supposed that the debtor corporation was the owner of several oil wells in the East Texas oil field. Could it be said that by the mere filing of a petition for corporate reorganization under Section 77B of the Bankruptcy Act that the bankruptcy court could direct the trustee to produce the oil wells in such manner as to violate the valid proration laws of the State of Texas? If this be the law, many of the

corporations in the East Texas oil field could by availing themselves of the provisions of Section 77B produce their wells to capacity and thereby frustrate the State's conservation laws and completely disrupt the oil industry in Texas. These illustrations could be multiplied without end.

Accordingly, it is respectfully submitted that the Bankruptcy Court erred in refusing to grant the State's motion.

On page eight of respondent's brief, Section 57j (Title 11, U. S. C. A., Sec. 93j) is quoted, and it is urged that for the Bankruptcy Court to permit the State to proceed in confiscation in one of its own courts would amount to a violation of the provisions of such Section. This contention, we submit, is untenable. A mere reading of it demonstrates the unsoundness of the contention. Section 57j has to do with "*debts owing* to the United States, a state, a county, district or a municipality *as a penalty or forfeiture shall not be allowed.*"

The State of Texas in its attempt to enforce the provisions of Article 6066a, Section 10, Revised Statutes, of Texas, is not attempting to collect a debt, but is attempting to have offending property forfeited to it.

On pages ten to twenty-one of respondent's brief, argument is submitted in support of respondent's proposition number two, to the effect that the State's

confiscation act (Sec. 10, Article 6066a, Revised Statutes of Texas), is void and unconstitutional in that it contravenes the due process clause of the Fourteenth Amendment to the Federal Constitution. This same discussion may be found in the Trustee's brief in opposition to the State's Petition for Writ of Certiorari. We believe that the contentions made by the respondent have been sufficiently answered in the authorities cited in footnote two on page six of the State's brief. Moreover, the State of Texas does not contend that the confiscation act authorizes the condemnation of any oil except that which has been *produced in violation of law and that oil which has been transported in violation of law.* The numerous rules and regulations that have been set out and discussed in respondent's brief (pp. 23 to 29), are those for the violation of which the State may institute penalty suits as authorized by Article 6036, Revised Statutes of Texas, and that infractions of such rules might be held not to result in the forfeiture of oil. It will be time enough to decide these questions when they arise.

Under respondent's Proposition No. 3 (Respondent's Brief p. 2), and argument in support thereof (Pp. 22-31, Id.), it is contended that Article 6066a, Section 10, offends against Article 1, Section 8, Clause 3 of the Federal Constitution. The Trustee did not raise this point in the Court Below, but raises the same for the first time here; however, if it be determined that the validity of the act has been properly drawn in question, as to this provision

of the Federal Constitution we desire to point out that this question has already been foreclosed against the Trustee by a specially constituted three-judge court organized under Section 266, Judicial Code (28 U. S. C. A., 380), in *Atlas Pipe Line Co.* v. *Sterling et al.*, 4 Fed supp. 441, 443, wherein the court said:

> "We think it perfectly clear that, as applied to plaintiff, the complained of statutes are valid; that the requirements they make in no manner infringe upon any of its constitutional rights. They merely provide for such regulatory steps and measures as are reasonable, necessary, and proper to prevent the handling of oil made by the statute contraband for handling, and their terms in no sense impose any burdensome restrictions upon interstate commerce, or take plaintiff's property without due process, or deny it the equal protection of the laws. *Plaintiff's broad position comes in the end to no more than an insistence upon its right to transport, in violation of the express prohibitions of the statute, oil which has been illegally produced.* No reason presents itself to our minds for believing that the Legislature, having the authority to conserve the natural resources of the state, is without power to impose upon common carriers by pipe line, inter and intra state, police regulations to make its prohibition against wasteful production effective. The complaint against the penalties as excessive may be disposed of by the observation that there is no proof that in the absence of an opportunity for hearing on the validity of the statute, these penalties are sought to be applied.
>
> "We therefore reject, as without merit, plaintiff's attacks upon the statutes.

"Nor do we think any stronger the position taken against the rules and regulations, the orders and requirements of the Commission. Certainly it goes without saying that the terms of a statute or the orders and actions of the Commission under it might be so burdensome and exacting as in effect to prevent or prohibit, contrary to the Fourteenth Amendment and the commerce clause, the conduct of the legitimate business of interstate transportation by pipe line. No such burdensome exactions are, however, shown to have been imposed here. It is hardly claimed, it is certainly not proven, that the requirements of the commission cannot be complied with without visiting irreparable injury on plaintiff. What is in effect asserted is that, since plaintiff is engaged in the business of transporting oil, an article of interstate commerce, the commission may not, in regard to reports and disclosures, impose duties upon it which require an expenditure of time, money or effort by it. We think the decisions cited do not support this view. The state may subject interstate, as well as intrastate, carriers to reasonable police regulations for the purpose of enforcing the public policy of the state in regard to shipments into or out of it. Sligh v. Kirkwood, 273 U. S. 52, 35 S. Ct. 501, 59 L. Ed. 835; Greer v. Connecticut, 161 U. S. 519, 16 S. Ct. 600, 40 L. Ed. 793; N. Y. ex rel. Silz v. Hesterberg, 211 U. S. 31, 29 S. Ct. 10, 53 L. Ed. 75; Hudson County Water Co. v. McCarter, 209 U. S. 349, 28 S. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560. Or the handling of business within its borders, Field v. Barber, Asphalt Paving Co., 194 U. S. 618, 24 S. Ct. 784, 48 L. Ed. 1142; M. K. & T. R. R. v. Haber, 169 U. S. 613, 18 S. Ct. 488, 42 L. Ed. 878; Asbell v. Kansas, 209 U. S. 251, 28 S. Ct. 485, 52 L. Ed. 778, 14 Ann. Cas. 1101;

Texas Co. v. Brown, 258 U. S. 465, 42 S. Ct. 375, 66 L. Ed. 721.

"We see no reason to doubt that oil illegally produced may not be, against statutory mandate, lawfully transported, Julian Oil & Royalties Co. v. *Capshaw*, 145 Okla. 237, 292, p. 841. All that it is claimed the commission has done, or is doing here, is that it will put plaintiff to some expense, cause it some trouble, and to some extent hamper the conduct of its business, in its efforts to prevent oil being produced, stored, and transported in violation of law." (Italics added).

WHEREFORE, the State of Texas prays as it did in its Original Brief.

RESPECTFULLY SUBMITTED,

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No. 28

THE STATE OF TEXAS, AND J. C. CLOPTON AND BULLOCK HYDER, Receivers, *Petitioners*,

v.

DAVID DONOGHUE, Trustee of Trinity Refining Company, Debtor, *Respondent*.

BRIEF OF THE STATE OF TEXAS IN REPLY TO SUPPLEMENTAL BRIEF FILED BY DAVID DONOGHUE, TRUSTEE.

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DAVID DONOGHUE, Trustee of Trinity Refining Company, Debtor, *Respondent.*

BRIEF OF THE STATE OF TEXAS IN REPLY TO SUPPLEMENTAL BRIEF FILED BY DAVID DONOGHUE, TRUSTEE.

STATEMENT.

Since the granting of the writ of certiorari by this Court (R. 130) the Bankruptcy Court, upon a motion of a secured Creditors' Committee, entered a different order directing that the estate of the debtor Corporation be liquidated, and the Trustee has been directed to liquidate the estate in pursuance of Section 77B (C) (8) and Section 77B (K) of the Bankruptcy Act of the United States, as amended. The estate of the debtor, as will be disclosed by the Motion and

Supplemental Brief filed by David Donoghue, Trustee in this cause, has been referred to the Referee in Bankruptcy. Order directing the estate to be liquidated has in no manner affected the subject matter of the cause in this Honorable Court.

Petitioners agree that the Motion should be granted and David Donoghue substituted in his now capacity.

Since the Trustee in Bankruptcy has received his appointment as a Trustee in the liquidation proceeding, the Referee in Bankruptcy has appointed new and different counsel to represent the Trustee who prepared and filed the Supplemental Brief in his behalf. The Trustee was no doubt pressed for time in the preparation and the filing of the Supplemental Brief and, as will be pointed out, have overlooked certain phases of the record in making assertions relative to the title and possession of the oil in question. In order to correct the mistake we call the Court's attention to the following:

Respondent on Page 2 of his Supplemental Brief, in Paragraph 1 and again on Page 4, under "Contentions of this Respondent", Paragraph 1, sub-section 1, it is stated in substance that "The alleged illegal oil was in the actual possession of the Trinity Refining Company, Debtor, at the time of the filing of its Petition for Corporate Reorganization under the provisions of Section 77B of the Bankruptcy Act." Such is not the record but, on the contrary, the alleged illegal oil was in the custody and possession of the State Court Receivers, Bullock Hyder and J. C. Clopton, at the time of the filing of the Petition for Corporate Reorganization and so found to be in the State Court Receivers by the Trial Court in the Trial Court's findings of fact (R. 90), from which we quote in part:

> "Thereafter the State Court Receivers qualified by giving the necessary bond and taking the oath required, and on October 30, 1935 actually took charge of the properties and estates of Trinity Refining Company and the other defendants described in the Order of the

Court, and continued to hold said properties until the 18th day of December, 1935, when they were summarily dispossessed by David Donoghue, the Trustee appointed by this Court in the instant cause."

ARGUMENT.

Accordingly, it is submitted that the Debtor Corporation did not have unquestioned right and title to the oil involved at the time of the filing of the Reorganization Petition in the Bankruptcy Court, for the reason that the record discloses that all of the properties of the Debtor Corporation were in the possession of State Court Receivers and the only authority for the Bankruptcy Trustee's possession of the oil is the Order of the Bankruptcy Court directing that the State Court Receivers be dispossessed of the properties of the Debtor Corporation. When the State Court Receivers took charge of the properties of the Debtor Corporation in the State's Penalty Suit, Trinity Refining Company was then stripped of all right to possess or control its properties, and the State Court Receivers from the date of their appointment continued to exercise control over such properties until they were dispossessed by the Bankruptcy Trustee and when they were enjoined by the Bankruptcy Court from interfering in any manner with the possession of the same by its Trustee. It is therefore apparent that Respondent's contentions on Pages 4, 5, and 6 of the Supplemental Brief are without merit.

The Respondent seems to make much in his Supplemental Brief of the fact that no suit has been filed having for its purpose to obtain a judgment evidencing a confiscation of the oil in question. In response thereto we respectfully call the Court's attention to portions of the record, as follows:

On December 18, 1935, the Federal Court entered its Order and upon the same day that the Reorganization Petition was filed without notice or hearing appointing its Trustee (R. 29-30), and among other things entered the following injunction:

"And all other persons, firms, corporations, and all creditors of said Debtor, as well as each of their attorneys, agents and servants, and all sheriffs, marshals and other officers, deputies and employees be and they are hereby jointly and severally restrained and enjoined from removing, transferring or otherwise interfering with property, assets and effects of the above named Debtor, and from prosecuting, executing or suing out of any Court any process or attachment or other writ for the purpose of taking possession, impounding or interfering with any property, assets or effects of said Debtor, and from molesting, disturbing or interfering with the Trustee named and appointed herein and hereby in the discharge of his duties."

The Court's attention was timely directed to this situation in the filing of motions and pleas disclosed by the record, and thereafter on the 15th of January, 1936, the Court again entered its Order (R. 53, 54) enjoining all persons and attorneys, agents and servants, jointly and severally, from continuing the prosecution of any pending suits, and from "prosecution of any suit or suits or any cause of action upon any debt, claim or demand against the Debtor in any Court or Tribunal other than the Court in which this Petition for Reorganization is pending" and thereafter the State of Texas, through proper Motion (R. 73), advised the Court that the injunctions were in fact suits against the State of Texas inhibited by the Eleventh Amendment to the Constitution of the United States. Thereafter the United States District Court modified its Order in so far only as to permit the State of Texas to proceed with the trial of its Penalty Suit and the trial of its Tax Suit in the State Courts (R. 74, 75). This being the state of the record the Attorney General went back into the Federal Court, after having been advised by the State Court officially so to do and in order to make certain that the agencies of the State were not running counter to the injunctions then in effect through the Federal Court, by Motion (R. 75), requested by detailed pleading the right to institute its cause of action

against the oil in question for the State of Texas, setting up a description of the oil, the provisions of the confiscation law, pleading, the orders prohibiting production, transportation and handling of illegal oil in toto no attack was made on the Orders of the Commission and they have not been brought up. The State again tendered the record proof to the United States District Court, theretofore reduced to writing, and filed in the United States District Court evidencing the illegality of the oil. Upon a hearing of said motion to set aside the injunction and permit the State to file against the oil the Court without hearing any additional testimony entered its order (R. 86) releasing 69,900 barrels of the oil in a pit to the State, and refused to permit the State to file against approximately 78,000 barrels of oil described therein.

It is thus shown from the record in response to Respondent's contentions made in his Supplemental Brief that the oil was in possession of the State Court at the time of the filing of the Reorganization Proceedings in the Federal Court, and that the State has been throughout enjoined and restrained from instituting suit in a Court of competent jurisdiction to obtain judgment evidencing the confiscation of the oil.

WHEREFORE, Petitioners respectfully pray as in their Original Brief.

Respectfully submitted,

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Assistant Attorney General.

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IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1936

No. [redacted] 28

STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDER, Receivers, *Petitioners*,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING CO., Debtor, *Respondent*.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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IN THE

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vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING CO., Debtor, *Respondent*.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit

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To the Honorable, the Justices of the Supreme Court of the United States of America:

COMES NOW the respondent, David Donoghue, Trustee of Trinity Refining Company, Debtor, and presents this, his brief in opposition to the petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and respectfully shows to the Court:

PROPOSITIONS UPON WHICH RESPONDENT RELIES

1.

The Bankruptcy Court properly took from the state receivers in the penalty suit the properties of the debtor, because the lien sought to be enforced in that suit came into existence through legal proceedings within four months of the date of the filing of the petition for re-organization, and was void, and the opinion of the Circuit Court of Appeals in so holding is not in conflict with Henderson vs. Mayer, 225 U. S. 631, 56 L. Ed. 1233.

2.

The filing of the petition in the State Court for the recovery of gasoline taxes and for the foreclosure of the statutory lien and the refusal of the State Court to appoint a receiver when the petition was first presented, did not have the effect of vesting the State Court with exclusive jurisdiction of the properties of the debtor subject to the lien, and the opinion of the Circuit Court of Appeals is not in conflict with the following cases: Farmers Loan & Trust Co. vs. Lake Street Elevated Railway Co., 177 U. S. 51, 44 L. Ed. 667; Peck vs. Jenness, et al., 7 Howard 612, 12 L. Ed. 841; Wabash Ry. Co. vs. Adelbert College, 208 U. S. 38, 52 L. Ed. 379; Buck vs. Colbath, 3 Wallace, 70 U. S. 334, 18 L. Ed. 257; Palmer vs. Texas, 212 U. S. 118, 53 L. Ed. 435; Lion Bonding Co. vs. Karatz, 262 U. S. 77, 67 L.

Ed. 871; Harkin vs. Brundage, 276 U. S. 36, 72 L. Ed. 457; Penn. General Casualty Co. vs. Pennsylvania, 294 U. S. 189, 79 L. Ed. 850; United States vs. Bank of New York and Trust Co., 296 U. S. 463, 80 L. Ed. 330; Straton vs. New, 283 U. S. 318, 75 L. Ed. 1060; Bryan vs. Speakman, 53 Fed. (2d) 463; In Re White Star Refining Co., 74 Fed. (2d) 269; Duparquet vs. Evans, 297 U. S. 216, 80 L. Ed. 591.

3.

The jurisdiction of the Bankruptcy Court in re-organization proceedings under 77 (b) is complete and exclusive, and the Court is entitled to the possession of the properties of the debtor wherever located, and regardless of whether they are in the custody and control of another court.

4.

The Circuit Court of Appeals did not err in holding that the petroleum which the State sought to confiscate was not a nuisance per se, that the title to it was in the debtor at the time the petition for re-organization was filed, and that it passed to, and is held by, the trustee as part of the debtor's estate.

5.

The confiscation statute of Texas (Sec. 10, Art. 6066a, Revised Statutes of Texas) providing for confiscation by the State of so-called illegal oil is void and unconsti-

tutional for that it contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States.

6.

Article 6066 (a), Sec. 10, Revised Statutes of Texas, providing for forfeiture to the State of so-called unlawful oil is a direct burden on interstate commerce and contravenes Article 1, Sec. 8, Clause 3 of the United States Constitution.

Statement and Argument Under Respondent's First Proposition

Statement

The petitioners contend that the Bankruptcy Court was without jurisdiction to take over the custody of the properties of the debtor because at the time they were so taken over, the properties were in the custody of state receivers appointed in a cause in which the State of Texas sought to recover of the debtor and certain other defendants, the sum of $791,000.00 in fines and penalties for alleged violation of State conservation acts. The petitioners contend that the State had a statutory lien upon the properties of the debtor to secure the payment of the fines and penalties. The statute under which petitioners claim the lien is Article 1373, Revised Statutes of Texas, as follows:

"The state shall have a lien on all such property from the date that suit shall be instituted by the Attorney-General or County Attorney acting under his direction, in any court of competent jurisdiction within the State, for the purpose of forfeiting the Charter or cancelling the permit of such corporation, or for such fines and penalties. The institution of such suit for such fines, penalties or forfeitures shall constitute notice of such lien." (See p. 2, Opinion of Circuit Court of Appeals.)

The companion statute to the one just quoted is Article 1372, Revised Statutes of Texas, which is as follows:

"Whenever any domestic or foreign corporation in this state shall violate the laws of this state, including the law against trusts, monopolies and conspiracies or combinations or contracts in restraint of trade, for the violation of which fines or penalties or forfeitures are provided, all property of such corporation within this state at the time of such violation, or which may thereafter come within this state, shall, by reason of such violation, become liable for such fines or penalties and for cost of suit and cost of collection."

The Circuit Court held (0.4) that the lien relied upon by petitioners came into existence through legal proceedings, and as it was so created within four months of the filing of the petition for re-organization, it was

void under Section 67 (f) of the Bankruptcy Act (11 U.S.C.A., Sec. 107 (f)).

Argument

After diligent search, we have been unable to find any case by a Texas Court construing Article 1373 above referred to. We have found one case in which the Statute was involved (*Waters Pierce Oil Co. vs. State*, 103 S.W. 840), but the court made no attempt to pass on the question of when the lien came into existence.

It is readily apparent, we think, that the lien discussed in *Henderson vs. Mayer*, 225 U. S. 631, 56 L. Ed. 1233, is vastly different from the lien asserted by the State in this instance. The one, as pointed out by the Court, was an inchoate lien given by statute, of which all creditors were bound to take notice, and subject to which they were presumed to have contracted when they dealt with the insolvent. The other has no character of existence prior to the institution of the suit, nor could any creditor, dealing with the debtor, foresee that it might arise.

The word "inchoate" is defined by the New Standard Dictionary thus: "Existing in its elements or in an incipient state; begun or entered upon but not in full existence or operation." And, by Words and Phrases: "Imperfect; unfinished; begun but not completed." Clearly the landlord's lien in the *Henderson vs. Mayer* case was within those definitions, and equally clearly the lien of

the State sought here to be invoked by petitioners is not within those definitions.

The fact that the asserted lien is held in connection with a debt not dischargeable in bankruptcy does not prevent it from being voided. *In Re Green*, 179 Fed. 870.

Statement and Argument Under Respondent's Second and Third Propositions

Statement

The petitioners contend that the Bankruptcy Court had no power to direct its trustee to take possession of the Trinity Refining Company and its property because, on Dec. 14, 1935, about four days prior to the institution of the re-organization proceeding, the State of Texas had filed a suit in one of the State Courts of Travis County against the corporation and certain other defendants in which it sought to collect the sum of $104,-084.47 alleged to be due the State as gasoline taxes, and in said suit sought to foreclose a statutory lien upon the property of the debtor and requested the appointment of a receiver of the debtor's properties, pending the foreclosure of the lien. (Record p. 120.)

Upon the presentation of that petition to the State Judge, he declined to appoint a receiver. (Record p. 120-121.) Later, and after the institution of the re-organization proceeding, and the seizure of the property by the Federal Trustee, an amended petition in the tax

suit was filed by the State, and the State Court undertook to appoint receivers.

The Circuit Court of Appeals held that the State Court did not, by the filing of the tax suit, and the refusal of the State Judge to appoint a receiver on Dec. 14, 1935, acquire jurisdiction over the properties of the debtor to the exclusion of other courts and the Trustee in re-organization lawfully took over the custody of the property. This the petitioners assign as error.

Argument

We do not believe that the opinion of the Circuit Court of Appeals is in conflict with any of the cases cited by the petitioners. Some of them, *Farmers Loan & Trust Co. vs. Lake Street Elevated Ry. Co.* 177 U. S. 51, 44 L. Ed. 667; *Peck vs. Jenness, et al.*, 7 Howard 612, 12 L. Ed. 841; *Wabash Ry. Co. vs. Adelbert College*, 208 U. S. 38, 52 L. Ed. 379; *Lion Bonding Co. vs. Karatz*, 262 U. S. 77, 67 L. Ed. 871; *United States vs. Bank of New York and Trust Co.*, 296 U. S. 363, 80 L. Ed. 330; *Straton vs. New*, 283 U. S. 318, 75 L. Ed. 1060; *Byran vs. Speakman*, 53 Fed. (2d) 463; *In Re White Star Refining Co.*, 74 Fed. (2d) 269, are clearly not in point here.

In *Buck vs. Colbath, 3 Wallace;* 70 U. S. 334, 18 L. Ed. 257, the Court held that whenever property has been seized by an officer of the Court by virtue of its process, the property is to be considered as in the custody of that Court to the exclusion of other courts, but point-

ed out that the principle has its limitations and that it is only while the property is in the possession of the Court, either actually or constructively, that the exclusive possession exists.

In *Palmer vs. Texas*, 212 U. S. 118, 53 L. Ed. 435, the Court held that the fact that an appeal had been taken to the Court of Civil Appeals of Texas from an order of the State District Court appointing a receiver did not oust the State Court of its exclusive jurisdiction.

In *Harkins vs. Brundage*, 276 U. S. 36, 72 L. Ed. 457, a stockholders bill had been filed in the State Court and a receiver prayed for, but receivers were not actually appointed. Five days later, and before the appointment of State Receivers, a creditors bill was filed in the Federal Court, Federal Receivers were appointed and took charge of the property. Mr. Chief Justice Taft declared:

> "The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this Court. As between two courts of concurrent and coordinate jurisdiction the court which first obtains jurisdiction and constructive possession of the property by filing the bill, is entitled to retain it without interference and cannot be deprived of its right to do so, because it may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject matter in litigation in the one is not within the cog-

nizance of the other, or there is no constructive possession of the property in dispute by the filing of the bill; it is the date of the actual possession of the receiver that determines the priority of the jurisdiction * * * *. We conclude that if the decision of this motion turned on the question of priority of jurisdiction on the face of the two bills, it could not be said that the courts were exercising concurrent jurisdiction."

The opinion then discusses the fact that the delay in the appointment of the receivers by the State Court was caused by certain frauds perpetrated on the State Court for the sole purpose of permitting the creditors bill to be filed in the Federal Court and receivers to be appointed by the Federal Court. It was ordered that the Federal Receivers surrender the property to the State Court, but was further said:

"It is quite true, as already said, that if there had been no chicanery in the delay of the proceedings in the State Court, the difference between the two proceedings would have justified the retention of the jurisdiction by the Federal Court."

In *Penn. General Casualty Co. vs. Pennsylvania*, 294 U. S. 189, 79 L. Ed. 850, the Court said:

"Where the assertion of jurisdiction by the two courts (State and Federal) is nearly simultaneous, it becomes important, as in the present case, to determine the precise time when the jurisdiction at-

taches. If the two suits do not have substantially the same purpose, and thus the jurisdiction of the two courts may not be said to be strictly concurrent, and if neither court can act effectively without acquiring possession and control of the property pendente lite, the time of acquiring actual possession may perhaps be the decisive factor * * * but when the two suits have substantially the same purpose and the jurisdiction of the two courts is concurrent, that one whose jurisdiction and process are first invoked by the filing of the bill is treated as a constructive possession of the property and as authorized to proceed with the cause."

We think that the opinion of the Circuit Court of Appeals in the present case is supported by, and not in conflict with, these latter cases. Certainly it cannot be said that the suit in the State Court for the collection of taxes and the re-organization proceedings in the Federal Court had substantially the same purpose. The jurisdiction of the two courts could not then have been concurrent; neither court could act effectively without acquiring possession and control of the property pendente lite. Therefore, the court which actually acquired possession and control of the property, rather than the court in which the bill was first filed, was entitled to retain possession of the res.

Certainly it could not be said that the effect of the act of the State Judge in declining to appoint receivers

when the petition was first presented to him, and thus take possession of the res, was to draw to the State Court, in fact, the possession and custody of such res. This would be to say his act accomplished the very thing he declined to do.

In the case of *Shields vs. Coleman*, 157 U. S. 168, 39 L. Ed. 660, the Supreme Court said:

> "While the validity of the appointment (of the receiver) made by the Circuit Court on June 6, 1892, cannot be doubted, yet, when that court thereafter accepted a bond in lieu of the property, discharged the receiver, and ordered him to turn over the property to the railroad, and such surrender was made in obedience to this order, the property then became free for the action of any other court of competent jurisdiction. It will never do to hold that after a court, accepting security in lieu of the property, has vacated the order which it has once made appointing a receiver, and turned the property back to the original owner, the mere continuance of the suit operates to prevent any other court from touching the property."

If, by vacating an order appointing a receiver, and discharging the receiver, a court releases its exclusive right to the custody of the property and leaves the way open for other courts to attach their jurisdiction to the property, then it would seem that an order of a court declining to appoint a receiver in the first place would

leave the property so that it might be seized by other courts.

One must believe that Congress, when it passed 77 (b), had in mind the previous decisions of the Courts holding that in ordinary bankruptcy proceedings the bankruptcy court was not authorized to oust receivers of other courts holding property of the bankrupt as an incident to the foreclosure of valid, specific liens, and that when Congress used the broad language it did use in 77 (b), it meant for the bankruptcy court, when acting under that section, to have much broader powers than in ordinary bankruptcy cases, and that it fully intended that the re-organization court should have power to take over from all receivers, regardless of the character of the suit in which they were appointed, all the properties of the debtor held by them. 77 (b) fully protects vested interest by requiring that a plan of re-organization be filed, and that the plan contain provisions fully protecting lien holders and vested interests. 77 b (c) (10); (b) (5). For these reasons, we are unable to agree with the holding of this Court in *Duparquet Huot and Moneuse Co. vs. Evans*, 297 U. S. 216, 80 L. Ed. 591.

Regardless of this, however, we find nothing in *Duparquet, Huot and Monuese Co. vs. Evans*, in any way in conflict with the decision of the Circuit Court of Appeals in the present case. In that case the Court, through Mr. Justice Cardozo, was speaking of valid specific liens

and property in the actual possession of State Receivers, pending the foreclosure of such liens.

It is difficult to understand how corporate re-organizations under Sec. 77 (b) can accomplish the purpose which Congress evidently intended, if the Federal Courts find themselves ousted of jurisdiction over the properties of debtors simply because somewhere, in some other court, a suit is pending for the foreclosure of liens upon such property. We can see how comity and a respect for the jurisdiction of other courts might require a Federal Court, operating under Sec. 77 (b) to decline to interfere with property actually in custody of the other court in which a valid, specific lien was in the process of being foreclosed, but there seems to us to be a vast difference between merely assuming jurisdiction over and taking possession of property, upon which a foreclosure suit is pending in some other court, and in actually wresting the property from the hands of the officers of another court.

Statement and Argument Under Respondent's Fourth Proposition

Statement

The State of Texas contends that it should be permitted to institute confiscation proceedings against approximately 69,000 bbls. of oil now in the possession of the Trustee. (Records p. 126.) The title to the oil was

in the debtor at the time the petition for re-organization was filed. (Record p. 158-159.) The Circuit Court of Appeals held that the oil was valuable property and was not a nuisance *per se*, that it passed to the trustee as a part of the debtor's estate, and that it was properly in the custody of the Bankruptcy Court.

Argument

The confiscation statute, under which the State seeks to move, is Article 6066, (a), Sec. 10, Revised Statutes of Texas, and is set out in appendix C of Petitioners' Brief. We agree with petitioners that this and related statutes are penal in the international sense, and we agree that it cannot be enforced by the courts of a foreign jurisdiction, including the Federal Bankruptcy Court. But, to grant the motion of the State and permit it to institute in a State Court confiscation proceedings against this oil would be, we think, to do the very thing which the petitioners and Judge Hutcheson, in his dissenting opinion, say the Bankruptcy Courts could not do,—that is, move to the enforcement of the penal laws of a state. There is no controversy, of course, about the title to this oil being in the debtor and hence in the trustee in bankruptcy, unless it can be said that at the very instant the alleged unlawful acts were committed, which the State claims has made the oil liable to condemnation, the oil was then and there forfeit, and that the judicial proceedings prescribed by Article 6066 (a), Sec. 10, Revised Statutes of Texas, are merely for the purpose of

enforcing the already existing forfeiture. We realize that in *United States vs. 1960 Bags of Coffee*, 8 Cranch 298, 3 L. Ed. 603, the Court held that the forfeiture of the coffee occured at the instant the unlawful importation occurred, and that in many other cases of like character it has been held that the judicial proceedings and seizure of the property were the consequence of the forfeiture and not its cause. As was pointed out in *United States vs. Grundy*, 3 Cranch 351, 2 L. Ed. 459, however,

> "Where a forfeiture is given by a statute, the rules of the common law may be dispensed with, and the thing forfeited may either pass immediately from or on the performance of some particular act, as shall be the will of the legislature. This must depend upon the construction of the statute."

We know of no case by a Texas Court in which this statute has been construed. But, construing the statute according to the plain import of the words used, it is clear that it was not the intention of the legislature that the forfeiture should occur until the steps prescribed by the statute should be complied with. Paragraph (a) of Section 10 of the Statute provides:

> "All unlawful oil and unlawful products regardless of the date of production or manufacture thereof, are hereby declared to be a nuisance and *shall be forfeited to the State as hereinafter provided* * * * * *. (Italics ours.)

Paragraph (b) of the same Section declares:

> "When the Attorney-General is advised from any source of the presence and existence of unlawful oil and/or unlawful products, it shall be his duty to institute a suit in rem against such unlawful oil * * *."

Paragraph (c) of the same Section provides:

> "* * * if upon trial of such suit, the oil or product in controversy is found to be unlawful oil or unlawful products, then the court trying said cause shall render judgment forfeiting the same to the State of Texas and authorizing the issuance of an order of sale," etc.

The language used excludes the idea that the forfeiture occurs prior to the entry of judgment of condemnation.

If this is true, then good and lawful title to the oil in controversy here is in the trustee in bankruptcy and the debtor. This being the case, if the Bankruptcy Court should direct that the trustee surrender this oil to the State for confiscation, such action would plainly be in aid of the enforcement by the State of one of its penal laws, and in violation of the rule that: "The courts of no country execute the penal laws of another."

In addition to this, the petitioners are asking the Court to do an unreasonable thing. Petitioners admit that this trustee has the actual possession of the oil in

question, but ask this Court to sustain their demand that the Bankruptcy Court direct this trustee to surrender to petitioners the oil in question upon their naked allegation that it is unlawful oil. Even though this Court were to hold that the principle invoked in *United States vs. 1960 Bags of Coffee*, supra, applies here, the Bankruptcy Court ought still to have the right to pass upon the question of whether or not the oil is in fact unlawful, and until and unless the Bankruptcy Court finds that the petitioners' allegations that the oil is subject to forfeiture are true, the Bankruptcy Court should retain possession of the oil and decline to permit the institution of the confiscation proceedings.

Statement and Argument Under Respondent's Fifth Proposition

Statement

This respondent urged in the Circuit Court of Appeals that the confiscation act aforesaid is unconstitutional and void because it contravenes the due process clause of the Fourteenth Amendment to the United States Constitution. That Court found it unnecessary to pass on the question. (p. 5 of the majority opinion, p. 159 of the Record.)

Argument

Oil has long been recognized as a legitimate article of commerce. *Gilette vs. Mitchell*, 214 S.W. 619; 31 Tex.

Jur. p. 520; *State of Indiana vs. Indiana and Ohio Oil Co.*, 120 Ind. 575, 6 L.R.A. 579, 22 N.E. 778; *Ohio Oil Co. vs. Indiana*, 177 U. S. 190, 44 L. Ed. 729.

The Legislature of Texas undertakes to say that any oil produced or transported in violation of the laws of the State or the orders of the railroad commission is a nuisance and shall be forfeited to the State. In a famous opinion of the Supreme Court of Alabama, *First Avenue Coal Co. vs. Johnson*, 54 So. 598, 3 L.R.A. (ns) 552, it was said:

> "The Constitutional right of the citizen cannot be abridged or destroyed under the guise of police regulations. The legislature, therefore, cannot, by its mere ipse dixit, make that a nuisance which is not in fact or in truth a nuisance, or akin thereto. That which has none of the elements or characteristics of a nuisance, that has no capacity or tendency to injure the public health, the public morals, the public interests, cannot be made a nuisance by the legislature under the guise of the police regulations declaring it to be so."

In the case of *People vs. Steele*, 40 Pac. (2d) 959, the California Court of Appeals said:

> "It is a general rule, * * * * * that the violation of a penal statute does not constitute a nuisance unless the doing of the prohibited acts would constitute a nuisance in the absence of the statute. 46 C. J. p. 660."

In *Crossman vs. City of Galveston*, 247 S.W. 810, the Supreme Court of Texas held a municipal ordinance unconstitutional, saying:

> "The ordinance declares that all delapidated buildings are nuisances, even though none of the elements necessary to constitute a nuisance may exist. It does not require that such building shall injure, hurt or harm anyone. It is not limited to those instances where the delapidated buildings may 'hurt or annoy the lands, tenements or hereditaments of another.' It is not confined to those delapidated buildings which endanger life or health, violate the laws of decency or obstruct the reasonable and comfortable use of the property, or which are subsersive of public order, decency or morals, or which constitute an obstruction of public right. It amounts merely to a general condemnation of delapidated buildings as nuisances and authorizes their destruction. It is apparent that, even with express legislative sanction, such a definition of a nuisance would be void. Not even the legislature can declare that a nuisance which is not so in fact."

The Supreme Court of the United States, in *West vs. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716, in discussing the case of *Ohio Oil Co. vs. Indiana*, supra, said:

> "The statute (in question in the case discussed), was one of true conservation, securing the rights of property, not impairing them. Its purpose was to

secure to the common owners of the gas a proportionate acquisition of it,—a reduction to possession and property,—*not to take away any right of use or disposition after it had thus become property.* It was sustained because such was its purpose; and we said that the surface owners of the soil were owners of the gas as well and could not be deprived of the right to reduce it to possession without the taking of private property. It surely cannot need argument to show that if they could not be deprived of the right to reduce the gas to possession, they could not be deprived of any right which attached to it in possession. * * * The Oklahoma statute far transcends the Indiana statute. It does what this Court took pains to show that the Indiana statute did not do. * * * It does not alone regulate the right of the reduction to possession of the gas, but when the right is exercised, when the gas becomes property, takes from it the attribute of the property,—the right to dispose of it. * * * Gas, when reduced to possession, is a commodity; it belongs to the owner of the land; and when reduced to possession is his individual property, subject to sale by him and may be subject of intra-state commerce and inter-state commerce." (Italics ours.)

In *Lawton vs. Steele*, 152 U. S. 133, 38 L. Ed. 385, the Supreme Court declared:

"To justify the State in thus interposing its authority in behalf of the public, it must appear first

that the interest of the public generally as distinguished from those of a particular class, require such interference." And second, "that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon the individual. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupation. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

In that case the Court upheld the statute of New York, denouncing certain fish-nets as nuisances and providing for their seizure and confiscation. But in so doing, the court used this significant language:

"Many articles, such, for instance, as cards, dice and other articles used for gambling purposes, are perfectly harmless in themselves, but may become nuisances by being put to an illegal use, and in such cases, fall within the ban of the law and may be summarily destroyed. *It is true that this rule does not always follow from the illegal use of a harmless article. A house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose,* but where *minor articles* of personal property are devoted to such use, the fact that they may be used for a lawful purpose

would not deprive the legislature of the power to destroy them." (Italics ours.)

As we said in our brief in the Circuit Court of Appeals, there can be no question, surely, that oil produced or transported in violation of some state conservation law or rule or regulation is just as valuable, can be put to every legitimate use and can serve the world in all things as well as oil that has been produced and transported strictly in accordance with the conservation laws and the rules of the railroad commission. There is nothing inherently vicious about the oil itself, and it must be apparent to all that in passing the confiscation act the legislature did not seriously believe that the oil was actually a nuisance and that the public interests required its abatement, because the very statute which declares it a nuisance makes provision for it to move on into commerce. If it is unfit to be an article of commerce in the hands of the individual no cleansing process through which the State could put it could change its character.

Section 11 of said Article provides:

"The provisions of this act shall be cumulative of all other provisions of the Civil Statutes, the penal code and the code of criminal procedure, and the remedies herein provided shall be cumulative of all other remedies provided in the Civil Statutes, the penal code and the code of criminal procedure."

It becomes quite apparent, therefore, that this confiscation statute is purely a penalty, and that it was passed to be used as an additional punishment for violators of the conservation laws of Texas. It is our purpose to show that this penalty is so severe and oppressive as to be wholly disproportionate to the offense, and obviously unreasonable, and within the prohibitions of the Due Process Clause of the Fourteenth Amendment. To make this showing it is necessary to call the Court's attention to various provisions of the conservation laws and the regulations of the Railroad Commission:

The oil which article 6066 (a) declares shall be forfeited, is described in Sec. 1, paragraphs (d) and (e) of the Article, as follows:

> "(d) 'Unlawful oil' as that term is used herein shall include oil which has been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the Commission, and oil which has been produced within said State *in violation of any law of said State, or in violation of any order of the Commission*, and shall include any oil transported in violation of any such law or in violation of any such order."
>
> "(e) 'Unlawful product' shall be construed to include any product, any part of which was processed or derived in whole or in part from unlawful oil or from any product of unlawful oil or from unlawful gas or which is transported in violation

of any order of the Commission or in violation of any law of Texas."

The Legislature of Texas has made unlawful (Art. 6014, R. S. of Texas) the production of petroleum in such a manner or in such amount or under such conditions as to constitute waste. Among the things which it has declared shall constitute waste are the following:

"(a) The operation of any oil well or wells with an insufficient gas oil ratio * * *.

"(c) Underground waste or loss, however caused and whether or not defined in any other subdivisions hereof.

"(e) The creation of unnecessary fire hazards.

"(h) Surface waste or surface loss, including the storage, either permanent or temporary, of crude petroleum oil, or the placing any product thereof in open pits or earthen storage, and all other forms of surface waste or losses, or destructions without beneficial use, either of crude petroleum oil or of natural gas.

"(j) The production of crude petroleum oil in excess of transportation or market facilities or reasonable market demand * * * *."

The production of oil in violation of any of the foregoing provisions or any rule or regulation of the Railroad Commission made pursuant to such provision sub-

jects the petroleum so produced or any product made from it to confiscation under Article 6066 (a).

Article 6049 (c), Sec. 5, R. S. of Texas, requires that all persons producing, storing, transporting, refining, reclaiming, treating, marketing or processing crude petroleum or its products to keep in this State accurate records as to the amount produced, transported, etc. The failure of any such producer, transporter, refiner, etc., to keep such records makes the petroleum or products which he has manufactured or handled, subject to confiscation.

Pursuant to the various Statutes, the Railroad Commission has promulgated many rules and regulations. We quote some of them:

Rule 1 (Special Rules governing the East Texas Field).

> "All flowing wells shall be equipped with and produced through tubing of not more than 2½" in diameter. Bottom of tubing shall not be higher than within one joint of top of producing sand. * * *"

Rule 2:

> "All wells shall be equipped with adequate chokes, or beams, to properly permit the taking of allowable production."

Rule 4:

> "All flowing wells must be produced through a separator, of ample capacity, which separator shall be kept in good working order."

Rule 8:

"The gas oil ratio of each well shall not exceed 500 cubic feet of gas per barrel of oil * * *."

Rule 10:

"All casinghead gas, which cannot be utilized without violating the rules and regulations of the Commission, shall be piped to a point at least 150 feet from any producing well, stock tank, or other fire hazards, and burned. * * *"

Rule 12:

"Any rubbish or debris that might constitute a fire hazard shall be removed to a distance of at least 100 feet from the vicinity of the wells, tanks and pump station. All waste oil shall be burned or disposed of in such manner as to avoid creating a fire hazard or pulluting streams and fresh water strata."

Rule 15:

"All oil produced in said field shall be first measured by being run directly from the well in which it was produced into a lease tank for gauging and the same shall there be gauged by the producer and a record thereof kept and used as the basis for such production reports as are made to the Railroad Commission of Texas. Said lease "tanks shall be located on the lease on which the well whose oil is being measured is located, or on an adjoining lease.

One tank or tank battery only shall be used in the measurement of oil from any well or group of wells located on each lease * * *."

Rule 16:

"All purchasers, producers, pipe line and/or carriers of crude petroleum shall equip their gathering lines from field storage tanks with lockstops. New ball seals with name or initials of gathering or purchasing company, numbered consecutively, shall be attached to each stop cock after each run of oil * * *."

These are but a few of the many statutes and regulations governing the production, handling and refining of petroleum and its products, a violation of any of which makes the oil in connection with which the violation occurs subject to confiscation, and the offender liable to a penalty of not more than $1,000.00 for each and every day of such violation, and for each and every act of such violation as provided by Article 6036, R. S. of Texas, as follows:

"In addition to being subject to any forfeiture that may be provided for by law and to any penalty that may be imposed by the Commission for contempt for violation of its rules, regulations or orders, any person violating any of the provisions of this Act or of title 102, R.C.S. of Texas, 1925, as amended, or violating any rule, regulation or order of the Commission promulgated thereunder, shall

be subject to a penalty of not more than One Thousand ($1,000.00) Dollars for each and every day of such violation and for each and every act of such violation, to be recovered in any Court of competent jurisdiction * * *."

It may be that the penalties provided by Art. 6036, supra, of not more than $1,000.00 for each and every violation and for each and every day of violation, are not so excessive and unreasonable as to fall under the ban of the Fourteenth Amendment, although we believe they closely approach the line, but when, in addition to this penalty, provision is made for the complete forfeiture of all petroleum concerning which any violation has occurred, we think the bounds of reason are passed. Still more unreasonable is the provision of Article 6066 (a) which makes it possible to forfeit any petroleum product, any part of which is derived in whole or in part from unlawful oil. For instance, in the present case the oil which the State seeks to forfeit is fuel oil which the Court judicially knows to be a product of crude petroleum. In order to subject the whole of this fuel oil to forfeiture, it is only necessary, under Art. 6066 (a) to prove that one barrel of the fuel oil has been derived in whole or in part from unlawful oil.

It is assumed that obedience of the various Statutes and rules governing the production, handling and transportation of petroleum is highly desirable, and that violation should properly subject the offender to penalties. It is difficult to believe, however, that under our Con-

stitution the sovereign is permitted to exact, for such minor infractions, penalties of the drastic character provided in Article 6066 (a). We think the whole Statute providing for forfeiture appears on its face to be so harsh, unreasonable and oppressive as to go beyond the limits of the State's power to prescribe penalties for violations of the law. *St. Louis Iron Mountain So. Ry. Co. vs. Williams*, 251 U. S. 63, 64 L. Ed. 139; *Coffey vs. Harlan County*, 204 U. S. 659, 51 L. Ed. 666; *Seaboard Airline vs. Seegers*, 207 U. S. 73, 52 L. Ed. 108; *Waters Pierce Oil Co. vs. Texas*, 212 U. S. 86, 53 L. Ed. 417.

Statement and Argument Under Respondent's Sixth Proposition

Statement

The respondent did not urge in the Courts below, but urges here that Article 6066 (a), Sec. 10, R. S. of Texas, providing for forfeiture of unlawful oil is a direct burden upon interstate commerce and is in contravention of the commerce clause of the Federal Constitution. We assume that the Court judicially knows that the State of Texas contains the largest oil field in the world, that the State is the largest oil producing state in the Union, supplies a great portion of the petroleum and petroleum products moving in our interstate and foreign commerce, and that the major portion of the petroleum produced in Texas moves in commerce to other states, and only a small portion is consumed in Texas.

Argument

Oil produced in Texas and reduced to possession is private property and it and its products are legitimate articles of commerce and the subject of dealings that are nation-wide. The right to own it, to buy it for shipment, and to ship it in interstate commerce is not a privilege derived from State laws and not a right which the State may fetter with conditions and restrictions, but a common right, the regulation of which is committed to Congress and denied to the States by the Commerce Clause of the Constitution. *Lemke vs. Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458; *Schafer vs. Farmers Grain Co.*, 268 U. S. 189, 69 L. Ed. 909; *West vs. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716.

By Article 6066 (a), Sec. 10, the Legislature of Texas has denied the owner of oil produced, transported or handled in violation of any law of the State or rule of the Railroad Commission, the right to put such oil into interstate commerce, and has itself assumed control of the movement of such oil in all commerce. This is so obviously a direct and unlawful burden on interstate commerce that we think there is no need to develop the argument.

We understand that the Court will not pass on these questions if it is possible for it to affirm the Court below on any other grounds. In event, however, the other grounds fail, we seriously urge that this confiscation law is void and unconstitutional.

Conclusion

The respondent respectfully suggests that there is nothing in this case which requires this Honorable Court to grant the application for the writ of certiorari; in the event, however, the Court thinks otherwise and decides to grant the application, the respondent prays that the decision of the Circuit Court of Appeals be in all things affirmed.

Respectfully submitted,

W. B. HARRELL, of Dallas, Texas,
Attorney for the Respondent.

RUSSELL ALLEN, of Dallas, Texas,
of Counsel.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1937.

No. 28

THE STATE OF TEXAS, AND J. C. CLOPTON AND BULLOCK HYDER, RECEIVERS, *Petitioners*,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR, *Respondent*.

BRIEF FOR DAVID DONOGHUE, Trustee

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Of Counsel.

E. Duncan & Co., Brief Printers, Dallas

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In The

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THE STATE OF TEXAS, AND J. C. CLOPTON AND BULLOCK HYDER, RECEIVERS, *Petitioners*,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR, *Respondent*.

To the Honorable, the Justices of the Supreme Court of the United States:

Comes now David Donoghue, Trustee of the Trinity Refining Company, Debtor, Respondent in this cause, and respectfully presents this his brief. He asserts that the petitioners have no right to institute confiscation proceedings against the oil in controversy and that all relief for which they pray should be denied.

Propositions Upon Which Respondent Relies:

Proposition No. 1

The Circuit Court of Appeals did not err in holding that the petroleum which the State sought to confiscate was not a nuisance per se, that the title to it was in the debtor at the time the petition for reorganization was filed, and that it passed to and is held by the Trustee as part of the Debtor's estate.

Proposition No. 2

The confiscation statute of Texas (Sec. 10, Art. 6066a, Revised Statutes of Texas) providing for confiscation by the State of so-called illegal oil is void and unconstitutional for that it contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Proposition No. 3

Article 6606 (a), Sec. 10, Revised Statutes of Texas, providing for forfeiture to the State of so-called unlawful oil is a direct burden on interstate commerce and contravenes Article 1, Sec. 8, Clause 3 of the United States Constitution.

Statement and Argument Under Respondent's First Proposition

Statement

The oil in controversy was the property of the Debtor at the time the petition for reorganization was filed.

(Record P. 158, 159). The Circuit Court of Appeals held that the oil was valuable property and was not a nuisance per se, that it passed to the Trustee as a part of the Debtor's estate, and that it was properly in the custody of the bankruptcy court. (Record P. 119). The State of Texas contends that it should be permitted to institute confiscation proceedings against said oil. (Record P. 96). The State offered no evidence.

Argument

(a) In the first place, it strikes us as entirely unreasonable for the State to demand that the bankruptcy court turn over the oil to it so that confiscation proceedings might be instituted, without making any showing to the bankruptcy court that the oil is in fact subject to confiscation, that is, without any showing that the allegations of the State's motion, asserting that violations of the law have occurred in connection with the production and transportation of the oil, are true. We call the Court's particular attention to the fact that the record in this case is wholly barren of any evidence whatsoever concerning the truth of the State's allegations. Certainly, it would seem that before the State could expect the bankruptcy court to release the oil to it for confiscation, it should produce evidence in the bankruptcy court clearly establishing that the oil is in fact subject to confiscation. *In Re Mayer*, 156 F. 432.

(b) It is the State's contention that the Debtor had no property right in the oil at the time the reorganiza-

tion proceeding was instituted, because, it claims, prior to that time the alleged violations had occurred, and that instantly upon their occurrence the oil became forfeit to the State. It asserts that upon such forfeiture, all title and rights of the Debtor to the oil were devested and that title was vested in the State. In support of this, it urges the rule announced in *United States v. 1960 Bags of Coffee*, 8 Cranch 403, 3 L. Ed. 602, and the line of cases following it.

We believe that the statute under consideration here does not provide for a forfeiture immediately upon the violation, and that the rule announced in the *Bags of Coffee*, case, supra, does not apply. The statute is to be construed according to the plain import of its words. *United States v. Grundy*, 3 Cranch 351, 2 L. Ed. 459. But, regardless of this, the rule relied upon by the State is not decisive of the issue here. It is true that in the *Bags of Coffee* case this Court held that the forfeiture instantly occurred and that the judgment of condemnation related back to the forfeiture and vested the title as of that time in the sovereign, destroying all intermediate claims. It did not hold, however, that upon the *forfeiture*, title immediately vested in the Sovereign or that the rights of the owner were thereupon instantly devested out of him. For, as Mr. Justice Story said in *Clark v. Protection Insurance Co.*, 1 Story (U.S.) 134:

> "It is not correct to say that property *forfeited* is vested in the government at the very moment of *forfeiture*, and the title of the owner immediately

devested. On the contrary, the established doctrine is that, notwithstanding the *forfeiture*, the property remains in the owner until it is actually seized by the government, and then, by the seizure, the title of the government relates back to the time of the *forfeiture*. In the case of *United States v. 1960 Bags of Coffee*, 8 Cranch (U.S.) 404, and *Gelston v. Hoyt*, 3 Wheaton (U.S.) 247, there had been a seizure and prosecution for the *forfeiture* by the government. The case of *The Brig Mars* in this court (1 Gall. (U.S.) 192, 198) as to this point has never to my knowledge, been doubted or denied. The case of *Lockyer v. Offley*, 1 T.R. 252, 260, manifestly proceeded upon the ground that until seizure, the property of the owner was not devested."

(c) We agree with the State that the confiscation act under consideration is penal in the international sense, and that the bankruptcy court is without power to enforce it or move in aid of it. We are not able to concede, however, that because this is true, it is the duty of the bankruptcy court, which has the actual possession of the oil, to deliver it to the State in order to permit the State to institute confiscation proceedings against it. On the contrary, it is clear to us that such a move on the part of the federal court would be a plain violation of the rule—

"The courts of no country execute the penal laws of another."

To grant the State's request would be to recognize and assist in the enforcement of the State's penal statute. Although the State asserts that violations of its laws have made the oil forfeit to it, it does not follow that the oil is now the property of the State, for a seizure and a judgment of condemnation are yet to be accomplished. *Clark v. Protection Insurance Co.*, supra. It is true—

> "that if the prosecution in the courts of one country for a violation of its municipal laws is *in rem*, to obtain a forfeiture of specific property *within its jurisdiction*, a judgment of forfeiture, rendered after due notice, and *vesting the title* of the property in the state, will be recognized and upheld in the courts of any other country *in which the title* to the property is brought in issue." *Wisconsin v. Pelican Insurance Co.*, 127 U. S. 265, 32 L. Ed. 239. (Emphasis ours.)

but if a single judicial step remains to be taken for the condemnation under a forfeiture for violation of a penal law of one country, the courts of another country will neither move in aid of the enforcement of such forfeiture nor recognize titles contingent thereon. *Wisconsin v. Pelican Insurance Co.*, supra; *Rose v. Himely*, 4 Cranch 239, 2 L. Ed. 608. In the first case, the court distinguishes between a title already complete by virtue of the foreign judgment, and an asserted title requiring further judicial action to complete it. It points out that in whatever form the State pursues her right to punish

the offense against her sovereignty, every step of the proceeding tends to one end, the punishment of the offender, and quotes with approval the statement by Lord Kames in his *Principles of Equity* which had been cited and approved by Mr. Justice Story:

> "But this includes not a decree decerning from a violation; because no court reckons it is bound to punish, or *to concur in punishing* any delict committed extra territorium." (Italics our)

In *Rose v. Himely*, supra, a vessel owned by an American had violated a municipal law of France and, by such violation, had subjected itself and its cargo to forfeiture to France. The vessel was seized by the French, and carried before a tribunal at St. Domingo, which tribunal purported to be a lawful French court. There the vessel and its cargo were sold. Later the cargo made its appearance at an American port and the former American owners filed a bill to libel the cargo, claiming it as their property. The purchasers appeared and asserted their title, based upon the forfeiture, the seizure and a judgment of condemnation entered by the French tribunal. Mr. Chief Justice Marshall, after deciding that the tribunal at St. Domingo was unlawfully constituted and was not a lawful French court, determined that the judgment of condemnation was void. He then proceeded to examine the effect of the invalidity of such judgment on the purchasers' title and decided that

> "If this case is to be considered as if no sentence of condemnation was ever pronounced, the prop-

erty is not changed, and this court, having no right to enforce the penal laws of a foreign country, can not inquire into any infraction of those laws. The property in this particular case was purchased under circumstances which exclude any doubt respecting its identity, and respecting the full knowledge of the purchaser of the nature of the title he acquired. The sentence of condemnation being considered as null and invalid, the property is unchanged, and, therefore, ought to be recovered by the libellants in the court below."

(d) The only action one sovereign ever takes with regard to the penal laws of another is by way of extradition, to surrender offenders to the state whose laws they have violated. 3 *Michie's Enc. of U. S. Reports* 1076. And this right of extradition comes about only by virtue of treaties, and, among the American states, by virtue of the act of Congress providing for surrender of fugitives. Now, it is not disputed by any one that the oil in controversy is in the actual possession and custody of the Trustee in Bankruptcy and wholly within the federal jurisdiction. The State has, in effect, demanded the "extradition" of this alleged offending property, but, of course, there is no treaty requiring it; there is no statute permitting it.

(e) The Bankruptcy Act, Sec. 57j; (Title 11, U. S. C. A., Sec. 93(j) provides:

"Debts owing to the United States, a state, a county, a district, or a municipality as a penalty

> or forfeiture, shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction or proceeding out of which the penalty or forfeiture arose, with reasonable and actual cost occasioned thereby, and such interest as may have accrued thereon according to law."

Thus, the Congress has said that neither of the sovereigns would undertake to exercise its sovereign right in the properties and assets of the bankrupt and deprive the creditors of properties and funds out of which their claims could be paid, except to the extent such sovereign actually suffered pecuniary loss. *In Re Caponigri*, 192 F. 291. Although the demand of the State in this case may not be within the strict letter of the provision of the statute above quoted, it is plainly within its spirit and purpose. *In Re Weber*, 106 N.E. 98 (New York Court of Appeals). If the motion of the State should be granted, property out of which the innocent creditors of the Debtor corporation are entitled, in bankruptcy, to have applied to the payment of their claims would be gone; instead of being applied to the payment of their debts, it would be applied to the satisfaction of a state penalty. *In Re Southern Steel Co.*, 183 F. 358.

For these reasons, we think the judgment of the Circuit Court of Appeals is right and should be affirmed. In the event these grounds fail, then we urge the unconstitutionality of the confiscation act, and pass on to Propositions 2 and 3.

Statement and Argument Under Respondent's Second Proposition

Statement

We refer to the Statement under the First Proposition.

Argument

The State quarrels with us for setting out in our original brief in opposition to the petition, certain of the provisions of the conservation statutes and of the rules and regulations of the Railroad Commission promulgated thereunder which regulate different phases of the oil business in Texas, and the State says we have no right to have these provisions considered in passing upon the reasonableness and validity of the confiscation act, because, they say, they are not involved and no attempt has been made by the State to apply the same to our disadvantage here.

A sufficient answer to this is that, although the State does not, in its motion filed in the bankruptcy court, asking permission to institute confiscation proceedings against the oil, charge violations of the various provisions of the statutes and rules which we outline in the original brief, the State has not said and, of course, does not bind itself that it will not, if permitted to institute confiscation proceedings, take advantage in the confiscation proceedings of any violations which, under the law, it is entitled to take. We pointed out in our

original brief that a violation of any of the provisions we outlined would, under the statute, subject the oil to confiscation. And unless and until the Attorney General of Texas can, under the law, and does bind himself and the State of Texas to proceed in the confiscation proceedings only for the alleged violations with reference to excess production and transportation without tenders and to waive any other provisions of the law which might subject the oil to confiscation, we are surely in position to urge them all.

For the Court's convenience we list here the various provisions of the statutes and the rules of the Railroad Commission set out in the original brief:

The oil which Article 6066a declares shall be forfeited is described in Section 1, paragraphs (d) and (e) of the Article, as follows:

> "(d) 'Unlawful oil' as that term is used herein shall include oil which has been produced within the State of Texas from any well or wells in excess of the amount allowed by any order of the Commission, and oil which has been produced within said State *in violation of any law of said state, or in violation of any order of the Commission,* and shall include any oil transported in violation of any such law or in violation of any such order.
>
> (e) 'Unlawful product' shall be construed to include any product, any part of which was processed or derived in whole or in part from unlawful

oil or from any product of unlawful oil or from unlawful gas or which is transported in violation of any order of the Commission or in violation of any law of Texas." (Italics our)

The Legislature of Texas has made unlawful (Article 6014 R. S. of Texas) the production of petroleum in such a manner or in such amount or under such conditions as to constitute waste. Among the things which it has declared shall constitute waste are the following:

"(a) The operation of any oil well or wells with an insufficient gas oil ratio * * *

(c) Underground waste or loss, however caused and whether or not defined in any other subdivision hereof.

(e) The creation of unnecessary fire hazards.

(h) Surface waste or surface loss, including the storage, either permanent or temporary, of crude petroleum oil, or the placing any product thereof in open pits or earthen storage, and all other form of surface waste or losses, or destruction without beneficial use, either of crude petroleum oil or of natural gas.

(j) The production of crude petroleum oil in excess of transportation or market facilities or reasonable market demand * * *."

The production of oil in violation of any of the foregoing provisions or any rule or regulation of the Rail-

road Commission made pursuant to such provisions subjects the petroleum so produced or any product made from it to confiscation under Article 6066a.

Article 6049 (c), Section 5, R.S. of Texas, requires that all persons producing, storing, transporting, refining, reclaiming, treating, marketing or processing crude petroleum or its products keep in this state accurate records as to the amount produced, transported, etc. The failure of any such producer, transporter, refiner, etc., to keep such records makes the petroleum or products which he has manufactured or handled subject to confiscation.

Pursuant to the various statutes, the Railroad Commission of Texas has promulgated many rules and regulations. We quote some of them:

Special Rules Governing the East Texas Field

"Rule 1. All flowing wells shall be equipped with and produce through tubing of not more than 2½" in diameter. Bottom of tubing shall not be higher than within one joint of top of producing sand • • •

Rule 2. All wells shall be equipped with adequate chokes or beams to properly permit the taking of allowable production.

Rule 4. All flowing wells must be produced through a separator of ample capacity, which separator shall be kept in good working order.

Rule 8. The gas oil ratio of each well shall not exceed 500 cubic feet of gas per barrel of oil • • •

Rule 10. All casing head gas, which can not be utilized without violation of the rules and regulations of the Commission, shall be piped to a point at least 150 feet from any producing well, stock tank or other fire hazards, and burned * * *

Rule 12. Any rubbish or debris that might constitute a fire hazard shall be removed to a distance of at least 100 feet from the vicinity of the wells, tanks and pump station. All waste oil shall be burned or disposed of in such manner as to avoid creating a fire hazard or polluting streams or fresh water strata * * *

Rule 15. All oil produced in said field shall be first measured by being run directly from the well in which it was produced into a lease tank for gauging, and the same shall there be gauged by the producer and a record thereof kept and used as the basis for such production reports as are made to the Railroad Commission of Texas. Said lease tanks shall be located on the lease on which the well whose oil is being measured is located, or on an adjoining lease. One tank or tank battery only shall be used in the measurement of oil from any well or group of wells located on such lease * * *

Rule 16. All purchasers, producers, pipe line and/or carriers of crude petroleum shall equip their gathering lines from field storage tanks with lockstops. New ball seals with name or initials of

gathering or purchasing company, numbered consecutively, shall be attached to each stop cock after each run of oil * * *."

A violation of any of these regulations subjects the offender to a fine of not more than $1,000.00 for each and every day of such violation and for each and every act of such violation (Article 6036, R. S. of Texas) and, in addition, makes the oil in connection with which the violation occurs subject to confiscation.

Article 6066a, Section 10, which provides:

"All unlawful oil and unlawful products, regardless of the date of production or manufacture thereof, are hereby declared to be a nuisance and shall be forfeited to the State as hereinafter provided * * *."

It may be that the penalties provided by Article 6036, supra, of not more than $1,000.00 for each and every violation and for each and every day of violation are not so excessive and unreasonable as to fall under the ban of the Fourteenth Amendment, although we believe they closely approach the line, but when, in addition to this penalty, provision is made for the complete forfeiture of all petroleum concerning which any violation has occurred, we think the bounds of reason are passed.

Still more unreasonable is the provision of Article 6066a which makes it possible to forfeit any petroleum product any part of which is derived in whole or in part from unlawful oil. The oil in controversy is fuel oil,

which the Court judicially knows to be a product of crude petroleum. In order to subject the whole of this fuel oil to forfeiture then, it is only necessary under the statute to prove that one barrel of it was derived in whole or in part from unlawful oil.

The State attempts to justify the harsh penalties of the confiscation statute on the ground of police power and on its undoubted right to pass reasonable regulations looking to the conservation of petroleum, and it claims that so long as any regulation it passes has reasonable relation to the end sought to be accomplished, the courts are powerless to interfere.

We agree with the State that it possesses great powers concerning its natural resources. We agree that it is necessary to prevent the waste of petroleum. We do not agree with the State nor with the Circuit Court of Appeals in *Thompson v. Spear*, —— F. (2d) —— (not yet reported), that the situation in East Texas with reference to the production of petroleum became such as to require the declaration of martial law for a time. On the contrary, we emphatically deny that the situation in East Texas either required or was any excuse for the declaration of martial law. This court in *Sterling v. Constantine*, 287 U. S. 378, 77 L. Ed. 375, expressly denied it.

Although the sovereign possesses wide police power, that power nevertheless has its limits beyond which the sovereign can not go. *Lochner v. New York*, 198 U. S. 45, 49 L. Ed. 937, in which it was said:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by a state. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power and it would be enough to say that any price of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free of constitutional restraint. This is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the federal constitution is sought, the question necessarily arises: Is this a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty * * *."

Jacobs v. Massachusetts, 197 U. S. 11, 49 L. Ed. 643;

Mugler v. Kansas, 123 U. S. 623, 31 L. Ed. 205;
Minnesota v. Barber, 136 U. S. 313, 34 L. Ed. 455;
Atkins v. Kansas, 191 U. S. 207, 48 L. Ed. 148;
Buchanan v. Warley, 245 U. S. 60, 62 L. Ed. 149.

Nor can police power be put forward as an excuse for unjust and oppressive legislation.

Davidson v. New Orleans, 96 U. S. 97, 24 L. Ed. 616;

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220.

On the other hand, courts may inquire into the validity of a statute and hold it to be unconstitutional because it is not within the scope of legislative authority, and it may be without the scope of legislative authority either when it proposes to accomplish something prohibited by the constitution or to accomplish some lawful or even laudable object by means repugnant to the constitution.

And, as was said in *Sterling v. Constantine*, supra, the determination a governor may make (with reference to martial law) and within the range of the authority to preserve law and order have all the weight which can be attributed to state action, but

> "It does not follow from the fact that the executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the governor may take, no matter how unjustified by the exigency and subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat."

So, we think it can not be said that every means by which a state may seek to accomplish a lawful end is

justified because it bears a reasonable relation to the end. Though the end be within the power of the state, the means may be so harsh and oppressive as to meet the condemnation of the 14th Amendment.

St. Louis, Iron Mountain, Southern Ry. Co. v. Williams, 251 U. S. 63, 64 L. Ed. 139;

Coffey v. Harlan County, 204 U. S. 659, 51 L. Ed. 666;

Seaboard Air Line v. Seegers, 207 U. S. 73, 52 L. Ed. 108;

Waters Pierce Oil Co. v. Texas, 212 U. S. 86, 53 L. Ed. 417.

We think, therefore, that the right of the State to enforce this confiscation law does not depend upon the decision by the legislature that the law is reasonable, but that it must stand on its own bottom and that if it is plainly unreasonable, it will fall, regardless of the legislature's opinion about it.

We know, of course, that laws have been held valid which provide for the confiscation or forfeiture of property used in violation of the revenue laws and ships engaged in piracy and of property of traitors, etc., but we do not think it follows that sovereigns will be permitted to punish any and all crimes or offenses by the confiscation of property connected therewith or concerning which the crime or offense occurs.

This court has said in *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385, that a house may not be torn down because it is put to an illegal use, since it may be as readily used for a lawful purpose. And in the case of *United States v. The Brig Malek Adhel*, 2 Howard 209, 11 L. Ed. 239, this court, commenting on the right to confiscate, under the law of nations, ships and cargoes engaged in piratical acts, said that it was true that the law inflicts the penalty of confiscation

> "for gross and wanton violations of duty. But, then, it limits the penalty to cases of extraordinary turpitude or violence. For petty misconduct or petty plunderings, or petty neglect of duty, it contents itself with the mitigated rule of compensation in damages."

We believe that there must be a variety of cases to which the rigorous power of confiscation can not and ought not to extend. As was said in *Laurel Hill Cemetery v. San Francisco*, 216 U. S. 358, 54 L. Ed. 515:

> "And yet again, the extent to which legislation may modify and restrict the uses of property consistently with the constitution is not a question of pure abstract theory alone. Tradition and the habits of the community count for more than logic."

There must be an end somewhere to the power of the state to punish for crime. We dare say this court would not hesitate to declare invalid a state law providing that a person guilty of murder should be hanged, drawn and quartered. We find it difficult to believe also that this

court would let stand a law providing for the forfeiture of a field of wheat in the sowing of which a child had been unlawfully employed, or a law providing for the forfeiture of a Pullman car because of some unlawful conduct of the conductor therein. Of course, these are grossly exaggerated cases, but where is the line to be drawn? If the State of Texas can confiscate a million barrels of fuel oil because one barrel thereof has been produced or transported in violation of the law, then can not the State also confiscate a citizen's whole estate because of some minor infraction? These may be arguments of inconvenience, but we are unable to perceive the end of what the State might lawfully do if this law is valid.

Statement and Argument Under Respondent's Third Proposition

Statement

The Respondent did not urge in the Courts below, but urges here that Article 6066a, Sec. 10, R.S. of Texas, providing for forfeiture of unlawful oil is a direct burden upon interstate commerce and is in contravention of the commerce clause of the Federal Constitution. We assume that the Court judicially knows that the State of Texas contains the largest oil field in the world, that the State is the largest oil producing state in the Union, supplies a great portion of the petroleum and petroleum products moving in our interstate and foreign commerce,

and that the major portion of the petroleum produced in Texas moves in commerce to other states, and only a small portion is consumed in Texas.

Argument

Oil produced in Texas and reduced to possession is private property and it and its products are legitimate articles of commerce and the subject of dealings that are nation-wide. The right to own it, to buy it for shipment, and to ship it in interstate commerce is not a privilege derived from state laws and not a right which the state may fetter with conditions and restrictions, but a common right, the regulation of which is committed to Congress and denied to the states by the Commerce Clause of the Constitution. *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 66 L. Ed. 458; *Schafer v. Farmers Grain Co.*, 268 U. S. 189, 69 L. Ed. 909; *West v. Kansas Natural Gas Co.*, 221 U. S. 229, 55 L. Ed. 716.

The State admits in its argument that this so-called confiscation act does not stand alone but is a part of a general series of statutes and regulations looking to the conservation of the State's natural resources. The confiscation statute is one of the penalties imposed by the law for the violation of the order of the Railroad Commission of Texas promulgated June 18th, 1935, requiring all persons desiring to handle or transport petroleum or its products in Texas to obtain tenders or permits therefor.

We are mindful of the rule of this Court requiring that statutes and regulations discussed be set out at length some where in the brief. The regulations promulgated on June 18th, 1935, however, concerning tenders, are contained in twenty-seven legal size typewritten pages, exclusive of the forms therein provided for, and contain approximately 7,500 words, and we feel that to include these regulations in the brief would be grossly improper and would place a burden on the Court which the Court's briefing rule undoubtedly never contemplated. We will content ourselves, therefore, with setting out only a few of the many provisions of those regulations, in order that the Court may see that the confiscation act, when taken with the conservation statutes generally and these regulations, imposes a direct burden on interstate commerce.

Rule 3 of Section II of the aforesaid regulations:

> "Each and every producer of oil in the State of Texas is hereby required to execute under oath a report on Form SW-1 authorizing a gatherer (whether himself or someone else) to gather the oil from the properties of such producer * * *"

Rule 7. "No person shall ship or cause to be shipped crude petroleum within or from any oil field or from a gathering pipe line or system to a transporting or trunk pipe line, from a gatherer or pipe line to railroad tank cars, trucks, steamships, or any other transporting agency, or from a pipe line to a refinery, reclaiming or treating.

plant, loading rack, gasoline plant or between any two of the above mentioned unless and until such person has obtained an SW-3 tender covering such shipment in conformity with the provisions of this order. It is intended by this rule to require the issuance of a separate Form SW-3 to cover every change of possession or control of crude oil, regardless of whether ownership changes or not."

Rule 8. "No person shall ship or cause to be shipped within or from the State of Texas any oil imported or produced therein, unless and until such person has made and caused to be registered and approved with the Commission a tender in accordance with the provisions of Section II of this order * * *."

Rule 10. "Nothing in this order shall be construed to authorize the transportation, purchase, handling or acquisition of oil produced, transported, handled or acquired in violation of the laws of the State of Texas or of the Commission's orders, rules and regulations adopted pursuant thereto. In event there is any conflict between this paragraph and any other provision of this order, the terms of this paragraph shall control."

Rule 1, Section III:

"The provisions of Section IV of this order shall apply to products transported from each and every oil field situated in the State of Texas and

shall also apply to products transported to or from each and every storage pit, pickup pit, refinery, topping plant, blending plant, gasoline plant, reclamation plant, or other plant at which a product is manufactured, treated, washed, reclaimed or processed in said state. Every person owning or possessing any product who desires to transport or to have transported such product from any oil field in the State of Texas, or to or from any such pit, refinery or plant as aforesaid must first secure from such Commission, at its office hereinafter designated for that purpose, a tender authorizing such transportation. Before such tender shall be issued by the Commission, such person shall be required to file in the office of the Commission designated as aforesaid an application in writing, supported by affidavit, on Form SW-4 as prescribed by the Commission, containing the following information:

(a) Name and address of the person tendering such product or products;

(b) Name and address of the person receiving such product or products under such tender;

(c) Amount and kind of product or products tendered;

(d) Place or places where delivery will be made to the receiving agency;

(e) Location and ownership of the storage or refinery tanks or other receptacles containing or to contain the product or products so tendered;

(f) A statement of the oil or the product from which the tendered product or products were and will be manufactured. Such statement may be made by showing that the person tendering has received or will receive under specified tenders of the Commission, oil or products (not otherwise used or disposed of) sufficient in quantity to cover the manufacture of the tendered product or products.

(g) Where the product tendered is gasoline or other product derived from gas, the person applying for a tender may, if such person is the operator of the plant at which such gasoline or product was or is to be manufactured and from which shipment is to be made, show the source of such gasoline or other product by stating the plant manufacturing same and the names and locations of the properties producing the gas constituting the source of such gasoline or other product and the period of time within which accumulated.

(h) No method of proof of the source of the tendered product or products herein referred to shall be deemed to be exclusive."

Rule 2. "The agent of the Commission in charge of the office in which an application for tender is herein required to be filed is charged with the duty

of investigating and hearing the applications for tenders filed in such office. All agents or employees of the Commission working in or attached to such office are charged with the duty of assisting said agent in charge of said office in checking, examining and calculating the accuracy of applications for tenders filed in such office. No such tender will be issued except after public hearing, held (except in case of an emergency) not less than twelve (12) hours subsequent to the filing of the application therefor and not less than five (5) hours after notice has been given by posting on a bulletin board at or in such office the names of applicants for tenders and the products and amounts stated in said applications. In case of an emergency requiring earlier consideration of an application for tender, the said agent in charge of the office where such application is filed is authorized to waive any of the formal requirements or rules of procedure stated in this paragraph, provided that the substantial requirements of this order are maintained, and provided further that the name of the applicant obtaining a tender on an emergency basis, together with products and amount thereof covered by such tender and the serial number of such tender, shall be posted on such bulletin board within twelve (12) hours after the approval of such emergency tender and remain so posted for a period of at least twenty-four (24) hours.

At the public hearing (whether held after notice as aforesaid or held without notice on a showing of emergency) any interested person shall have the right to appear and make a showing in support of or in opposition to any application for tender and to examine any witness testifying at such hearing."

Rule 4. "No application for a tender will be approved by the Commission to cover or to authorize the transportation of a product processed from oil or gas produced, transported, handled or acquired in violation of the laws of Texas or of the Commission's orders, rules and regulations adopted pursuant thereto. No application for tender will be approved by the Commission to cover or authorize the transportation of a product processed from a product of oil or gas produced, transported, handled or acquired in violation of the laws of Texas or of the Commission's orders, rules and regulations adopted pursuant thereto."

Rule 8. "No person shall transport or receive for transportation any products from any oil field or to or from any storage pit, pick-up pit, refinery, topping plant, blending plant, gasoline plant, reclamation plant, or other plant at which a product is manufactured, treated, washed, reclaimed or processed situated within the State of Texas unless

and until such person has fully complied with the provisions of this order."

Rule 1, Section VI:

"In considering an application for approval of a tender under any of the provisions of this order, the Commission reserves the right to examine the books, accounts, records and property of such applicant and to require the production of books,, accounts and records of such applicant relevant to such application in order to assist it in calculating and determining the accuracy of any application before approving same, and to reject any such application if the facts therein stated necessary to the approval of such application are found to be false or not supported by the applicant's books, records and accounts."

A tender has been defined by Article 6066a, Section 1(g), as follows:

"The word 'tender' shall mean a permit or certificate of clearance for the transportation of oil or products approved and issued or registered under the authority of the Commission."

This is enough to show, we think, that no oil may be moved either within the State of Texas or from it until the person proposing to move it obtains from the Railroad Commission of Texas a tender or permit for such

movement. It is shown, too, we think, that before the Railroad Commission will issue any such tender or permit, it must be satisfied that the oil sought to be moved has not been produced or previously transported or handled in violation of any law of the State or of any rule of the Commission. The Court will readily perceive the lengths to which the Commission can go in determining for itself whether it will grant or refuse such tender or permit. If the Commission determines that any violation has occurred with reference to the production, handling or transportation of the oil, not only will it decline to issue the tender and thus prohibit further movement of the oil, but the oil itself, upon a judgment of condemnation, will be forfeited to the State. The owner of the oil, therefore, is denied the right to put it into interstate commerce. It all amounts to just this:

The State of Texas has undertaken to withhold from all commerce, intrastate, interstate and foreign, all oil which has been produced, transported or handled in violation of any of the multitude of statutes and rules and regulations which it has devised.

It is not doubted that the states possess, and have never surrendered, the power to protect the public health, morals and safety by any appropriate legislation which is not inconsistent with the national Constitution.

Missouri, etc., Ry. Co. v. Haber, 169 U. S. 628, 42 L. Ed. 878;

McLean v. Denver, etc., R. Co., 203 U. S. 38, 51 L. Ed. 78;

Houston, etc., R. Co. v. Mayes, 201 U. S. 321, 50 L. Ed. 772.

But it is equally well settled that whenever the statutes of a state invade the domain of legislation which belongs exclusively to Congress, they are void, no matter under what class of powers they may fall or how closely allied to powers conceded to belong to the states.

Henderson v. New York, 92 U. S. 271, 23 L. Ed. 543.

Nor can the state do anything which will directly burden or impede interstate commerce, and the police power does not justify such an interference.

Kansas City Southern Ry. Co. v. Kaw Valley Drainage District, 233 U. S. 75, 58 L. Ed. 857;

Illinois Central R. Co. v. Illinois, 163 U. S. 142, 41 L. Ed. 107;

McDermott v. Wisconsin, 228 U. S. 115, 57 L. Ed. 754.

It may not interfere with interstate commerce beyond what is absolutely necessary for its self-protection.

Hannibal, etc., R. Co. v. Husen, 95 U. S. 472, 24 L. Ed. 527.

Conclusion

WHEREFORE, the Respondent prays that the Judgment entered by the Honorable, the Circuit Court of Appeals be in all things affirmed.

Respectfully submitted,

W. B. HARRELL,
Attorney for the Trustee.

RUSSELL ALLEN,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 28

STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDE, RECEIVERS, ETC.,
Petitioners,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR.

Motion of David Donoghue, Trustee, Under an Order to Liquidate, to Be Substituted as Respondent for David Donoghue, Trustee.

R. W. KELLOUGH,
Tulsa, Oklahoma,
Attorney for Movant.

H. T. MCGOWN,
H. L. LOGAN, JR.,
Fort Worth, Texas,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1937

No. 28

STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDE, RECEIVERS, ETC.
Petitioners,

VS.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR,
Respondent.

Motion of David Donoghue, Trustee, Under an Order to Liquidate, to Be Substituted as Respondent for David Donoghue, Trustee.

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner, David Donoghue, Trustee, respectfully shows:

I

Your petitioner shows that he was heretofore and on the 18th day of December, 1935, appointed Trus-

tee of the estate and property of Trinity Refining Company, debtor, in a proceeding for the reorganization of a corporation, No. 1969, in bankruptcy, in the United States District Court for the Northern District of Texas; that he qualified and acted as such Trustee; that he was the respondent named and described in this cause and the writ of certiorari granted by this Honorable Court to the United States Circuit Court of Appeals for the Fifth Circuit.

II

Petitioner shows that on the 24th day of September, 1937, an order was entered by the Honorable District Court for the Northern District of Texas at Fort Worth, in Cause No. 1969, Trinity Refining Company, Debtor, for the liquidation of the estate and property of the debtor corporation under the provisions of Section 77B (c) (8) and Section 77B (k) of the Bankruptcy Act of the United States; a copy of said order is attached hereto and made a part hereof and marked "EXHIBIT A."

III

Petitioner shows that in pursuance of the terms of the order to liquidate aforesaid he was, on the 14th day of October, 1937, appointed Trustee at a meeting of the creditors called for that purpose in pursuance of Section 44 of the Bankruptcy Act; that he has qualified as such Trustee and is the duly

acting Trustee under the terms of the order to liquidate aforesaid.

IV

Petitioner says that by virtue of Section 46 of the Bankruptcy Act he should be substituted in his capacity as a Trustee under the order to liquidate aforesaid in lieu and instead of as Trustee before liquidation under the provisions of Section 77B; there is attached hereto and marked "EXHIBIT B" a copy of the order of the Honorable Glenn Smith, Referee, dated October 14, 1937, appointed petitioner Trustee, and there is attached hereto and marked "EXHIBIT C" a copy of the order of the Honorable Glenn Smith, Referee, dated October 14, 1937, approving the bond of petitioner as such Trustee.

V

Petitioner further says that, as Trustee under the order to liquidate aforesaid, he succeeded to all of the rights and powers of his former status as Trustee and that by virtue of the provisions of Section 77B (k) his appointment as Trustee is analogous and comparable to the appointment of a Trustee in general bankruptcy.

VI

Petitioner further says that upon his appointment as Trustee, under the order to liquidate, coun-

sel was appointed by the Court to represent petitioner in such capacity; that this cause is set down for submission to this Honorable Court and for argument during the week of the 18th of October, 1937; that petitioner desires that his change in status be made known to this Honorable Court and that petitioner be permitted to file a supplemental brief in such capacity for the purpose of supplementing the brief heretofore filed by petitioner in his former capacity.

WHEREFORE, this petitioner prays that an order be entered substituting him as respondent herein in his capacity as Trustee under an order to liquidate in lieu and instead of his former capacity as Trustee, and that he may have leave in such capacity to file a supplemental brief upon the propositions involved in this cause.

DAVID DONOGHUE, *Trustee.*

By R. W. Kellough
Attorney.

R. W. KELLOUGH, Tulsa, Oklahoma,
H. T. MCGOWN,
H. L. LOGAN, JR.,
Fort Worth, Texas,
Of Counsel.

I, R. W. KELLOUGH, duly appointed attorney for DAVID DONOGHUE, Trustee, hereby certify that a copy of this motion has been delivered in person to counsel for petitioners and to counsel for the original respondent in this cause.

R. W. Kellough

SWORN TO AND SUBSCRIBED before me this 15th day of October, A. D., 1937.

.....

Notary Public in and for Tarrant County, Texas.

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS,

At Fort Worth.

In the Matter of TRINITY REFINING COMPANY, Debtor.

In Proceedings for the Reorganization of a Corporation.

No. 1939.

Order Directing the Trustee to Liquidate the Estate of Debtor Corporation.

On the 20th day of April, 1937, there came on to be heard the motion of H. U. Everett, D. K. Hutchcraft and Howard Hall, Secured Creditors' Committee, Trinity Refining Company, for an order directing the liquidation of the property and assets of the debtor corporation in this cause, in pursuance of the terms of Section 77b(k) of the Bankruptcy Act of the United States, as amended, and thereupon an order was entered on the 21st day of April, 1937, continuing the hearing thereon, reserving to movants the right to be heard thereon at such time as might be fixed and determined by the Court; on the

17th day of July, 1937, the motion again came on to be heard and by order made and entered as of that date it was thereupon continued to the 2nd day of August, 1937; upon said date the matter was again continued by order made and entered in this cause to the 21st day of August, 1937; upon said date it was again continued to the 15th day of September, 1937, by order made and entered in this cause; on the 15th day of September, 1937, it was not possible to be heard and it was thereupon continued until the 22nd day of September, 1937, at 10 o'clock in the forenoon.

On the 22nd day of September, 1937, the motion then came on to be heard and there appeared H. U. Everett, D. K. Hutchcraft and Howard Hall, Secured Creditors' Committee, Trinity Refining Company, by counsel, Trinity Refining Company, debtor corporation herein, by its officers in person and by counsel, David Donoghue, Trustee herein, in person and by counsel, The State of Texas, by W. J. Holt and Wm. C. Davis, Assistant Attorney Generals, the Department of Internal Revenue and W. A. Thomas, Collector, by J. L. Backstrom, Special Attorney of the United States, General American Tank Car Corporation, by counsel, John Tancred, Sr., in person, and Talco Pipe Line Company, by counsel.

Thereupon evidence was adduced and argument of counsel had and the Court finds that notice of the time, place and purpose of this hearing was duly given in the manner provided by the order hereto-

fore entered on the 1st day of April, 1937, as is evidenced by the order heretofore entered in this cause on the 20th day of April, 1937; That the order heretofore made and entered in this cause on the 15th day of January, 1936, purporting to confirm a plan of reorganization in this cause was not intended to confirm a completed plan of reorganization; that requisite acceptances of the plan of reorganization filed in this cause have not been secured or tendered in conformance with the plan of reorganization; that the debtor corporation is insolvent; and that it is not possible that an acceptable plan of reorganization can be filed or offered in this cause; and that the Court is of the opinion that the property and estate of the debtor corporation should be liquidated by directing the Trustee to liquidate the estate in pursuance of the provisions of Section 77-b(k) of the Bankruptcy Act of the United States, as amended, it is, therefore,

ORDERED—

That the order heretofore made and entered in this cause on the 15th day of January, 1936, approving and confirming the plan of reorganization proposed by the debtor corporation be set aside in so far as the said order purports to confirm a plan of reorganization in this cause, and it is further

ORDERED—

That the Trustee liquidate the estate of the debtor corporation herein pursuant to the provisions of Sec-

tion 77-b(c)(8) and Section 77-b(k) of the Bankruptcy Act of the United States, as amended, and it is further

ORDERED—

That this cause be referred to the Honorable Glenn Smith, one of the Referees of this Court, for all matters pertaining to the further administration and liquidation of the estate of the debtor corporation herein, except as to such matters as are herein specifically reserved, and it is further

ORDERED—

That the Honorable David Donoghue, Trustee, now in possession of the assets and property of debtor corporation under orders of this Court, be and remain in possession thereof as Trustee, pending the appointment of a Trustee or Trustees at the first meeting of creditors to be held by the Referee in pursuance of Section 77-b(k)(3) of the Bankruptcy Act of the United States, as amended, and it is further

ORDERED—

That all of the orders heretofore entered in this cause with respect to the possession and custody of the estate and property of the debtor corporation and/or the conduct of the business of debtor corporation by the Trustee be and remain in full and binding force and effect until the appointment of a Trustee or Trustees, as hereinabove ordered, and be it further

ORDERED—

That no orders shall be entered by the Referee, to whom the matter is here referred, or any action taken by the Honorable David Donoghue, Trustee, or the Trustee or Trustees to be hereafter appointed, as hereinabove ordered, with respect to certain crude oil or petroleum products now in storage in possession of the Trustee in this cause which shall in any manner conflict with or be violative of an order entered in Cause No. 28, October Term, 1937, Supreme Court of the United States, on the 3rd day of July, 1937, by the Honorable Benjamin M. Cordovo, Associate Justice, in the case of the State of Texas and J. C. Clopton and Bullock Hyder, Receivers vs. David Donoghue, Trustee, Trinity Refining Company, debtor, in which case the right of title and custody to the crude oil or petroleum products is involved, and be it further

ORDERED—

That all claims of creditors heretofore filed with the Honorable Glenn Smith as Special Master in this cause, shall be delivered to and filed with the Honorable Glenn Smith as Referee in Bankruptcy and shall be considered to be filed with the Referee as of the date of the delivery of the claims to the Referee by the Special Master and that the status of all claims heretofore passed upon and determined by the Honorable Glenn Smith as Special Master in this cause and as reflected by his reports as Special Master, heretofore filed in this cause, shall be

deemed to have been heard and determined with respect to the amount and status thereof, without reference to rights of priorities between the creditors whose claims are therein reported, or otherwise; all claims hereafter to be filed shall be proved, as provided in Section 57 of the Bankruptcy Act of the United States and in conformance with Section 77-b(k)(4) of the Bankruptcy Act, and it is further

ORDERED—

That there is reserved to this Court the right to hear and determine all matters with respect to allowances for Trustee's fees, counsel fees and disbursements to the Trustee herein, counsel for the Trustee, counsel for debtor corporation, creditors' committees and counsel for creditors' committees, and it is further

ORDERED—

That all applications for allowances for Trustee's fees, counsel fees and disbursements by the Trustee herein, counsel for the Trustee, counsel for debtor corporation, creditors' committees, and counsel therefor, shall be filed with the Clerk of this Court on or before the 2nd day of November, 1937, to be thereafter heard and determined by this Court at such date as may be convenient.

Dated at Fort Worth, Texas, this 24th day of September, A. D. 1937.

J. C. WILSON,
District Judge.

EXHIBIT B

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF TEXAS
AT FORT WORTH

Office of Glenn Smith, Referee in Bankruptcy,
Fort Worth, Texas

Appointment of Trustee

In the Matter of Trinity Refining Company, Debtor, No. 1939 in Bankruptcy.

At Fort Worth, in said District, on October 14, 1937, before me, Glenn Smith, Referee in Bankruptcy:

This being the day appointed by the Court for the first meeting of creditors under said Bankruptcy, and of which due notice has been given in the Gladewater Times, Gladewater, Texas, and by mailing notices to all creditors listed in the schedules, I, the undersigned Referee of said Court in Bankruptcy, sat at the time and place above mentioned, pursuant to such order, to take the proof of debts and for the choice of a Trustee under said bankruptcy, and I do hereby certify that the creditors whose claims had been allowed and were present, or duly represented, failed to make choice of a Trustee of the bankrupt's estate, and therefore I

do hereby appoint David Donoghue of Fort Worth of the County of Tarrant and State of Texas, as Trustee of the same, and I do hereby fix the penal sum of his bond at $10,000.00.

GLENN SMITH,
Referee in Bankruptcy.

EXHIBIT C

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE NORTHERN DISTRICT OF TEXAS AT FORT WORTH

Office of Glenn Smith, Referee in Bankruptcy, Fort Worth, Texas

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At a Court of Bankruptcy, held in and for the Northern District of Texas, at Fort Worth, this 14th day of October, 1937.

Before Glenn Smith, Referee in Bankruptcy, in the District Court of the United States for the Northern District of Texas.

In the Matter of Trinity Refining Company, Debtor, Order Approving Trustee's Bond, No. 1939 in Bankruptcy.

It appearing to the Court that David Donoghue of Fort Worth, in said District, has been duly appointed Trustee of the estate of the above named bankrupt, and has given a Bond with sureties for the faithful performance of his official duties, in the amount fixed by the Court, to-wit, in the sum of Ten Thousand Dollars,

IT IS ORDERED, that the said bond be, and the same is hereby approved.

GLENN SMITH,
Referee in Bankruptcy.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 23 1937
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1937

No. 28

STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDE, RECEIVERS, ETC.,
Petitioners,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Supplemental Brief of David Donoghue, Trustee, following Order to Liquidate, Respondent.

R. W. KELLOUGH,
Tulsa, Oklahoma,
Attorney for Movant.

H. T. MCGOWN,
H. L. LOGAN, JR.,
Fort Worth, Texas,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM, 1937

No. 28

STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDE, RECEIVERS, ETC.,

Petitioners,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Supplemental Brief of David Donoghue, Trustee, under Order to Liquidate.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

DAVID DONOGHUE, Trustee, appointed under date of October 14, 1937, pursuant to an order to liquidate entered under date of September 24, 1937, with respect shows:

STATEMENT

The statements found in the briefs of petitioners and former respondent in this cause in the main set out the nature of the controversy. However, it is desired to emphasize two factors, which this respondent believes have an important bearing on the issues in controversy:

(1) The alleged illegal oil was in the actual possession of Trinity Refining Company, Debtor, at the time of the filing of its petition for corporate reorganization under the provisions of Section 77B of the Bankruptcy Act. The Trustee then appointed took possession of the oil and it has been continuously in the possession of the Trustee since that time.

(2) On the 24th day of September, 1937, upon motion of H. U. Everett, D. K. Hutchcraft and Howard Hall, Secured Creditors Committee, Trinity Refining Company, the Honorable District Court for the Northern District of Texas at Fort Worth, upon hearing, found that no proper plan for reorganizing the corporation had been accepted within the requisite period of time; that the corporation was insolvent; and ordered the estate of the debtor corporation liquidated by directing the Trustee to liquidate the estate in pursuance of the provisions of Section 77B (c) (8) and Section 77B (k) of the Bankruptcy Act of the United States as amended; that the case

be referred to a Referee and that a Trustee be appointed at a meeting of creditors to be called for that purpose in conformance with Section 44 of the Bankruptcy Act.

On the 14th day of October, 1937, at a meeting of creditors, called by the Referee to whom the matter was referred, a Trustee was appointed, in conformance with Section 44 of the Bankruptcy Act, the Honorable David Donoghue, this respondent, being so appointed, who thereafter qualified and who has filed in this cause his motion suggesting to this Court his appointment as Trustee under the order of liquidation aforesaid in the place and stead of the former respondent in this cause.

CONTENTIONS OF PETITIONERS

Petitioners in their brief make their argument under seven different points, which all may be reduced to the following propositions, viz:

(1) That Article 6066a of the Revised Statutes of 1925 of Texas is a lawful exercise of the police power of the State of Texas and under the terms of that article the mere circumstance of the overproduction of oil automatically results in a forfeiture with complete divestment of title out of the owner of the lease into the State of Texas; that, accordingly, title to the oil here in controversy passed to the State of Texas at the time such oil (allegedly) was

produced in violation of the rules of the Railroad Commission of Texas.

(2) That the District Court and the Circuit Court erred in declining to grant permission to the State of Texas to take proceedings for the confiscation of alleged illegal oil in a Texas State court of competent jurisdiction seeking confiscation of such oil, since the State of Texas acquired title to such oil prior to the filing of the petition under 77B, and since the claim of the State of Texas is unenforceable in the Bankruptcy Court.

CONTENTIONS OF THIS RESPONDENT

This respondent hereby adopts for all purposes the brief heretofore filed by the former respondent. However, it is desired to supplement the authorities filed in the former brief in that it is this respondent's opinion that the Honorable Trial Judge properly refused the State of Texas permission to proceed in the State courts with reference to the allegedly illegal oil and that the validity of the order of refusal is sustained by the following propositions:

I.

(1) Inasmuch as the oil in controversy was admittedly in the actual possession of the debtor at the time of the filing of the petition under Section 77B it follows that such right of possession was

immediately vested in the Trustee, and the Bankruptcy Court having taken possession of such property through its officer, the Trustee, thereby acquired such jurisdiction of the oil in question as to render the Bankruptcy Court fully competent to hear and determine all questions of title, possession and control of such oil.

(2) Since no judgment of forfeiture had been obtained by the State of Texas as against the oil in question at the time of the filing of the voluntary petition under 77B, and no such judgment has as yet been obtained by the State, full title to the oil in controversy was vested in the debtor at the time such petition was filed, and thereupon passed to the Trustee, who at this time retains full title, to the exclusion of any element of title in the State of Texas.

(3) Inasmuch as the Trustee in bankruptcy has both title and possession to the oil in question, any claim of the State of Texas in or to such oil, can only be asserted in the proceedings pending in bankruptcy.

(4) The claim asserted by the State of Texas against the oil is an attempt to assert a penalty and since such a claim is not cognizable in bankruptcy, the oil in controversy remains an asset in bankruptcy, subject to distribution to those creditors having provable claims under the provisions of the Bankruptcy Act.

(5) Upon the entry of an order to liquidate the estate of a debtor under Section 77B (c) (8) and 77B (k) of the Bankruptcy Act, the proceeding becomes comparable to general bankruptcy and is one for the primary benefit of the creditors of the debtor.

II.

PROPOSITION NO. 1 RESTATED

Inasmuch as the oil in controversy was admittedly in the actual possession of the debtor at the time of filing of the petition under 77B it follows that such right of possession was immediately vested in the Trustee, and the Bankruptcy Court having taken possession of such property through its officer, the Trustee, thereby acquired such jurisdiction of the oil in question as to render the Bankruptcy Court fully competent to hear and determine all questions of title, possession and control of such oil.

STATEMENT, AUTHORITIES AND ARGUMENT

Statement

It is uncontroverted that the oil in question, at the time the petition under Section 77B was filed, was in the actual possession of debtor, and is now in the possession of the Trustee appointed in the

proceedings in bankruptcy. (*Petitioner's Brief, pages 3, 4 & 5).*

Authorities

Baldwin, Ex Parte, 291 U. S. 610, 615, 54 S. Ct. 551, 78 L. Ed. 1020;
Board of Trade vs. Johnson, 264 U. S. 1, 11, 44 S. Ct. 232, 68 L. Ed. 533;
Herbert vs. Crawford, 228 U. S. 204, 205, 33 S. Ct. 484, 57 L. Ed. 800;
Isaacs vs. Hobbs Tire & Timber Co., 282 U. S. 734, 737, 738, 51 S. Ct. 270, 75 L. Ed. 645.
Murphy vs. Hofmann, 211 U. S. 562, 568, 569, 28 S. Ct. 141, 53 L. Ed. 327.
Wabash Refining Co. vs. Adelbert College, 208 U. S. 38, 54, 28 S. Ct. 182, 52 L. Ed. 379.

Argument

It was early established by this Court that a Federal District Court sitting in bankruptcy not only possesses the power directly granted by the Bankruptcy Act, but in addition possesses such necessary equitable powers as may be necessary to carry into effect the provisions of that Act. As a corollary of that rule it has long been recognized that when a Bankruptcy Court acquires possession of property through its officers it thereby obtains such jurisdiction over the property as to render it competent to pass on all questions of title, possession and control. This proposition was established in

1909 by this Court in an opinion written by Mr. Justice Moody, who said:

> "But where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal or state. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. *The court, having possession of the property, has an ancillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property.*" (Italics ours). *Murphy vs. Hofman*, 211 U. S. 562, 568, 569, 28 S. Ct. 141, 53 L. Ed. 327.

The same proposition was affirmed by an opinion of this Court by Mr. Justice Roberts, who said:

> "Upon adjudication, title to the bankrupt's property rests in the trustee with actual or constructive possession and is placed in the custody of the bankruptcy court . . . It follows that the bankruptcy court had exclusive jurisdiction to deal with the property of the bankruptcy estate . . . When this jurisdiction has attached the court's jurisdiction cannot be affected by actions brought in other courts . . . This is by an application of the well recognized rule that when a court of competent jurisdiction takes possession of property through its officers, this withdraws the property from jurisdiction of all

other courts, which 'though of concurrent jurisdiction 'may not disturb that possession; *and that the court originally acquiring jurisdiction is competent to hear and determine all questions respecting title, possession and control of the property'.*" (Italics ours). *Isaacs vs. Hobbs Tire and Timber Company*, 282 U. S. 734, 737, 738, 51 S. Ct., 270, 75 L. Ed. 645.

Other opinions by this court to the same effect are as follows: *Board of Trade vs. Johnson*, 264 U. S. 1, 11, 44 S. Ct., 232, 68 L. Ed. 533; *Ex parte Baldwin*, 291 U. S. 610, 615, 54 S. Ct., 551, 78 L. Ed. 1020; *Herbert vs. Crawford*, 228 U. S. 204, 205, 33 S. Ct. 484, 57 L. Ed. 800; *Wabash Refining Company vs. Adelbert College*, 208 U. S. 38, 54, 28 S. Ct., 182, 52 L. Ed. 379.

The order of the trial court denying the motion of petitioners, that the oil in controversy be released from the bankruptcy proceedings for the purpose of enabling the State of Texas to proceed under Article 6066a, amounted to a judgment affirming the jurisdiction of the Bankruptcy Court to hear and determine any question of title to the oil. Such position is supported by the above authorities.

III.

PROPOSITION NO. 2 RESTATED

Since no judgment of forfeiture had been obtained by the State of Texas as against the oil in question at the time of the filing of the voluntary petition under 77B, and no such judgment has as yet been obtained by the State, full title to the oil in controversy remained vested in the debtor until the date such petition was filed, and thereupon passed to the Trustee, who at this time retains full title to the exclusion of any element of title in the State of Texas.

STATEMENT, AUTHORITIES AND ARGUMENT

Statement

On page 20 of petitioners' brief it is argued that unlawful oil and unlawful products of oil become forfeit oil immediately upon being produced in violation of the law, and that as a result title is automatically divested out of the owner of the lease at the time of overproduction, and vested in the State of Texas.

It is uncontroverted that the State of Texas has not obtained a judgment of forfeiture in accordance with the provisions of Article 6066a, Section

10, Revised Civil Statutes of Texas (Acts 1935, 44th Leg., p. 624, Ch. 246), and that as a matter of fact, no proceedings have ever been instituted in the State Courts of Texas for the purpose of obtaining such a forfeiture. *(Petitioners' Brief, p. 2).*

Authorities

Article 6066a, Sec. 10, (a), (b) & (c), R. C. S.;
Berry vs. S. Maris, 76 N. J. L. 301;
Clark vs. Protection Insurance Co., 1 Story, 134 Fed. Cas. 2832;
Craig vs. Kline, 96 Pa. St. 399, 3 Am. Rep. 636;
Darsp vs. People, 51 Ill. 386, 2 Am. R. 301;
Heidretter vs. Elizabeth Oil Cloth Co., 6 Fed. 141;
The Kate Heron, 6 Sawy. 109, 111 Fed. Cas. 7619;
Matlow vs. Missouri, 295 U. S. 97, 79 L. Ed. 1327;
Schenck vs. Peay, 21 Fed. Cas. 683;
The Sterling (Cir. Ct., 5th Cir. 1933), 65 F. (2d) 439;
Strong vs. United States, (Cir. Ct. of App., 1st Cir.), 46 F. (2d) 257, 259;
Terrozas vs. Donohue, 227 S. W. 206, Aff. (1925), 275 S. W. 396; 115 Tex. 146;
United States vs. 1960 Bags of Coffee, 12 U. S. (8 Cranch) 398, 3 L. Ed. 603;
United States vs. One Hundred Barrels, 2 Abb. (U. S.) 314, 320, S. C. Fed. Cas. 15948;

United States vs. One Hundred Barrels Distilled Spirits, 14 Wall. 44, 20 L. Ed. 815;
United States vs. 66 Barrels of Whiskey, 25 F. Cas. No. 15095, 1 Abb. 93;
United States vs. Grundy, 3 Cranch (U. S.) 337, 2 L. Ed. 459;
United States vs. Mars, 12 U. S. (8 Cranch) 417, 3 L. Ed. 609;
United States vs. Stowell, 133 U. S. 1, 17, 33 L. Ed. 559;
United States vs. Three Hundred, Etc., 28 Fed. Cas. 124.

Argument

This respondent cannot agree with petitioners' arguments concerning title. At common law a forfeiture does not operate until, by proper judgment in an action instituted for that purpose, the rights of the sovereignty have been established. *United States vs. Grundy*, 3 Cranch (U. S.) 337, 2 L. Ed. 459; *United States vs. 66 Barrels of Whiskey*, 25 F. Cas. No. 15095, 1 Abb. 93; *Strong vs. United States*, (Cir. Ct. of App. 1st Cir.) 46 F. (2d) 257, 259.

When a forfeiture is declared by statute the common law rule as to the vesting of title may be dispensed with, subject to certain limitations, the chief of which is that the owner must be given notice, and the opportunity to defend, enforce and protect his rights before a court of competent jurisdiction or the due process clause of the constitution is violated.

Craig vs. Kline, 96 Pa. St. 399, 3 Am. Rep. 636; *Darsp vs. People*, 51 Ill. 386, 2 Am. R. 301; *Berry vs. S. Maris*, 76 N. J. L. 301; *Terrozas vs. Donohue*, 227 S. W. 206, Aff. (1925), 275 S. W. 396, 115 Tex. 146.

On the basis of the limitation referred to, this court, during the past one hundred years, has established definite rules concerning the time when title passes under various types of forfeiture statutes, as follows:

(a) If the act in question is absolute, that is, if it unqualifiedly provides that the commission of the illegal act thereby forfeits the property involved, the power of the sovereign to subject the property to forfeiture as of the time of the illegal act, is recognized. However, the mere commission of the illegal act does not automatically divest the owner of title. No element of title is vested in the sovereign until judgment of condemnation or of forfeiture is entered whereupon the title obtained by the sovereign will then be deemed to relate back and take effect as of the date of the illegal act.

For example, in the case of *United States vs. Stowell*, 133 U. S. 1, 17, 33 L. Ed. 559, this court said:

> "By the settled doctrine of this court whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited; the for-

feiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, *although their title is not perfected until judicial condemnation;* the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed, and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith." (Italics ours).

Other cases to the same effect are: *United States vs. 1960 Bags of Coffee*, 12 U. S. (8 Cranch) 398, 3 L. Ed. 603; *United States vs. 100 Barrels Distilled Spirits*, 14 Wall. 44, 20 L. Ed. 815; *Matlow vs. Missouri*, 295 U. S. 97, 79 L. Ed. 1327; *The Sterling* (Cir. Ct. 5th Cir. 1933) 65 F. (2d) 439; *Strong vs. United States*, (Cir. Ct. 1st Cir. 1931), 46 F. (2d) 257, 261; *Heidretter vs. Elizabeth Oil Cloth Co.*, 6 Fed. 141; *Clark vs. Protection Insurance Co.*, 1 Story 134, Fed. Cas. 2832; *United States vs. Three Hundred, Etc.*, 28 Fed. Cas. 124.

(b) If the statute in question fails to establish the time when the sovereign's rights shall take effect or if the statute is so written as to admit of doubt as to the effective time, then the common law rule will be followed and title will be deemed vested in the sovereign as of the date of the judgment of condemnation or of forfeiture.

For example, in the case of *United States vs. 1960*

Bags of Coffee, 12 U. S. (8 Cranch), 398, 405, 3 L. Ed. 602, this court said:

> "If the phraseology were such as, in the opinion of the majority of the court, to admit of doubt, it would then be proper to resort to analogy and the doctrine of forfeiture at common law, to assist the mind in coming to a conclusion."

Other cases to the same effect are: *United States vs. Mars*, 12 U. S. (8 Cranch) 417, 3 L. Ed. 609; *United States vs. One Hundred Barrels*, 2 Abb. (U. S.) 314, 320, S. C. Fed Cas. 15948; *The Kate Heron*, 6 Sawy. 109, 111, Fed. Cas. 7619; *Schenck vs. Peay*, 21 Fed. Cas. 683.

In the instant case, the State of Texas has not obtained a judgment of forfeiture and, accordingly, under either rule, title to the oil in controversy remains vested in Trinity Refining Company, or its lawful representatives. As a matter of fact, it seems clear that Article 6066a (10) Revised Statutes of 1925 of Texas does not provide for an absolute forfeiture, but instead specifically adopts the common law rule, with title vesting in the State of Texas, only following judgment of forfeiture and sale as under ordinary executions. This position is substantiated by the following provisions of the statute in question:

"Sec. 10, (a). All unlawful oil and unlawful products, regardless of the date of production or manufacture thereof, are hereby declared to be a nuisance

and shall be forfeited to the State as hereinafter provided."

"(b). When the Attorney General is advised from any source of the presence and existence of unlawful oil and/or unlawful products, it shall be his duty to institute a suit in rem against such unlawful oil and/or unlawful product and against all persons owning, claiming or in possession thereof."

"(c) . . . If, upon the trial of such suit the oil or product in controversy is found to be unlawful oil or unlawful products, then the court trying said cause *shall render judgment forfeiting the same to the State of Texas and authorizing the issuance of an order of sale directed to the sheriff or any constable of the County where the oil or products are located commanding such officer to seize and sell said property in the same manner as personal property is sold under execution.*" (Italics ours).

In view of the foregoing it is respectfully submitted that title to the oil in question has never vested in the State of Texas under the provisions of Article 6066a (10) of the Revised Statutes of 1925 of Texas, and that by the very language of the statute quoted above (Section (c), no forfeiture occurs until so decreed by a court of competent jurisdiction and no title passes until seizure and sale by the sheriff as under execution.

IV.

PROPOSITIONS NOS. 3 AND 4 RESTATED

3. Inasmuch as the Trustee in bankruptcy has both title and possession to the oil in question, any claim of the State of Texas in or to such oil, can only be asserted in the proceedings pending in bankruptcy.

4. The claim asserted by the State of Texas against the oil is an attempt to assert a penalty, and since such a claim is not cognizable in bankruptcy, the oil in controversy remains an asset in bankruptcy, subject to distribution to those creditors having provable claims under the provisions of the Bankruptcy Act.

STATEMENT, AUTHORITIES AND ARGUMENT

Statement

While the position is not clearly taken in any particular instance which may be quoted, throughout petitioners' brief it is apparent that petitioner is of the opinion that it should be entitled to the extraordinary relief for which it prays, largely by reason of the fact that it is a sovereign State, and that the usual provisions of the Bankruptcy Act should not apply since their enforcement would prevent the State of Texas from obtaining the full pen-

alties otherwise possible in a proceeding in the State Court.

Authorities

The Antelope, 10 Wheat, 66;
Commonwealth of Penn. vs. York Silk Mfg. Co., (Cir. Ct., 3rd Cir. 1911), 192 Fed. 81;
International Shoe Co. vs. Pinkus, 278 U. S. 261, 265, 73 L. Ed. 318, 320, 49 S. Ct. 108;
Matter of Abramson and Fichhandler, (Cir. Ct. 2nd Cir. 1914), 210 Fed. 878;
Matter of Semon, (U. S. Dist. Ct. Conn. 1935), 11 F. Supp. 18;
New York vs. Irving Trust Co., 288 U. S. 329, 333, 77 L. Ed. 815;
New York vs. Jersawit, (1923), 263 U. S. 493, 68 L. Ed. 405;
United States vs. Birmingham Trust Co., (Cir. Ct. 5th Cir. 1919), 258 Fed. 562;
Wisconsin vs. Pelican, 127 U. S. 265.

Argument

Mr. Justice McReynolds delivered the opinion of this Court in the case of *New York vs. Irving Trust Co.*, 288 U. S. 329, 333, 77 L. Ed. 815. In that opinion it was held that a sovereign State, as any other party, is bound by the Bankruptcy Act. In that case the State of New York failed to file its claim for taxes within the time fixed by the Referee. As a result its claim was disallowed. On appeal the State

of New York took the position that a requirement that a state file its claim within a specified time is an unconstitutional infringement of the State's sovereignty. Mr. Justice McReynolds in the opinion said:

> "The Federal government possesses supreme power in respect to bankruptcies. *International Shoe Co. vs. Pinkus*, 278 U. S. 261, 265, 73 L. Ed. 318, 320, 49 S. Ct. 108. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated."

By virtue of the terms and provisions of the Bankruptcy Act, assets and property of which the Trustee has title and possession may only be administered and distributed in conformance with the provisions of the Act itself. The State of Texas has not brought itself within any provision of the Bankruptcy Act entitling it to the relief it seeks. The sole authority advanced in support of petitioners' position is a State statute, which petitioner admits to be one of penalty and forfeiture. The statute in question does not eliminate even admittedly illegal oil from commerce, but has for its purpose a monetary penalty in favor of the State. Should the State be permitted to secure a forfeiture in a State court, in accordance with Article 6066a of the Revised Statutes of Texas and under petitioners customary procedure the oil

in controversy would be sold to the highest bidder, the State would pocket the money and in consideration of the purchase price would legitimatize the oil by granting the buyer tenders enabling the buyer to freely move the oil in intra-state commerce. Even though the State is here ostensibly claiming the oil itself such claim cannot conceivably constitute a provable claim in bankruptcy as defined in Section 63. On the contrary the claim falls definitely within that class denied by the terms of Section 57 (j) of the Bankruptcy Act, which provides:

> "Debts owing to the United States, a state, a county, a district, or a municipality as a penalty or forfeiture shall not be allowed, except for the amount of the pecuniary loss sustained by the act, transaction, or proceeding out of which the penalty or forfeiture arose, with reasonable and actual costs occasioned thereby, and such interest as may have accrued thereon according to law."

Under this Section Federal courts, sitting in bankruptcy, have not hesitated to disallow claims of the Federal government for penalties as well as those of the respective states. *United States vs. Birmingham Trust Company*, (Cir. Ct. 5th Cir. 1919), 258 Fed. 562; *Matter of Semon*, (U. S. Dist. Ct. Conn. 1935) 11 F. Supp. 18; *New York vs. Jersawit*, (1923) 263 U. S. 493, 68 L. Ed. 405; *Commonwealth of Penn. vs. York Silk Mfg. Co.*, (Cir. Ct. 3rd Cir. 1911) 192 Fed. 81; *Matter of Abramson and Fichhandler*, (Cir. Ct. 2nd Cir. 1914), 210 Fed. 878.

Although petitioner admits in its brief that it is seeking to enforce a penalty it may perhaps be argued that the State of Texas is not seeking to establish a claim in bankruptcy and that Section 57 (j) does not for that reason apply. If this be true, then the State of Texas is attempting to accomplish indirectly what it cannot do directly, and its efforts for that reason should fail. Certainly to order the Trustee to turn over to petitioner valuable assets, title and possession to which is held by the Trustee, for the purpose of enabling the State to enforce a penalty does as much violence to the letter and spirit of Section 57 (j) as would the action of a Bankruptcy Court in allowing a claim for penalties and directing payment by the Trustee before all lien and administration claims.

Not only is the position of the State of Texas in direct conflict with Section 57 (j) of the Bankruptcy Act, but it also violates the proposition first stated by Chief Justice Marshall in *The Antelope*, 10 Wheat. 66:

> "The Court of another country cannot execute the penalty laws of another."

In the case of *Wisconsin vs. Pelican*, 127 U. S. 265, this Court directly held that the Federal courts have no power to execute the penal laws of the individual states.

V.

PROPOSITION NO. 5 RESTATED

Upon the entry of an order to liquidate the estate of a debtor under Section 77B (c) (8) and 77B (k) of the Bankruptcy Act, the proceeding becomes comparable to general bankruptcy and is one for the primary benefit of the creditors of the debtor.

STATEMENT, AUTHORITIES AND ARGUMENT

Statement

The proceeding in bankruptcy in this cause was initiated by a petition for reorganization of a corporation filed under the provisions of Section 77B of the Bankruptcy Act by Trinity Refining Company. A Trustee was appointed and the administration of the property and assets of the debtor carried on under the provisions of the Act. On September 24, 1937, an order was entered by the Honorable District Court for the Northern District of Texas at Fort Worth, upon hearing, in which the debtor was found to be insolvent and its estate and property directed to be liquidated under the provisions of Section 77B (c) (8) and 77B (k) of the Bankruptcy Act. In pursuance of that order the matter was referred to a Referee, a meeting of creditors was called under the provisions of Section 44, and a Trustee was appointed by the creditors as

therein provided on the 14th day of October, A. D., 1937.

Authorities

Bankruptcy Act of 1898, as amended, Sections 44; 57 (j); 64; 77B; 77B (c) (8); and 77B (k);
In re: *Chez Marianne,* 15 F. Sup. 327.

Argument

Section 77B of the Bankruptcy Act (11 U. S. C. A. 207) was enacted primarily for the benefit of distressed corporations in that it seeks to give a distressed debtor corporation the opportunity to reorganize its capital structure and thus preserve the going concern value of its assets. Creditors are protected in that they are given a voice in the plan of reorganization and the whole procedure takes place under the direction and control of Federal courts, sitting in bankruptcy.

Section 77B (c) (8) of the Bankruptcy Act makes provision, however, for the liquidation of a debtor corporation when the possibility of a reorganization for its benefit no longer exists. By the terms of this section the court may direct a liquidation of assets and property of the debtor concern provided it is found to be insolvent and the possibility of equity or benefit to the debtor corporation no longer exists.

When an order for liquidation is entered the proceeding is no longer one for the benefit of the debtor corporation, but the liquidation as directed is for the primary benefit of its creditors. Section 77B (k) provides the manner of liquidation under Section 77B and, upon the finding of insolvency required by Section 77B (k) (8), a Trustee is to be appointed as provided in Section 44. Certain sections of the Act theretofore inapplicable become applicable upon liquidation, and the proceeding thereafter becomes one primarily and wholly for the liquidation and distribution of the assets and property of the debtor corporation to its creditors in a manner comparable to general bankruptcy.

The effect of an order to liquidate in a proceeding under 77B is discussed in an opinion by Judge Knox, of the Southern District of New York, in the case of *In re*: *Chez Marianne*, 15 F. Supp. 327, in which he said:

> "When a proceeding instituted under Section 77B (11 U. S. C. A. 207) turns out to have been abortive, and is relegated to the practice long familiar in ordinary bankruptcy, the theory of creditor control of the estate becomes operative, and creditors, pursuance to Section 44 (11 U. S. C. A. 72), are entitled to choose the Trustee who will administer the assets."

It is thus apparent that this proceeding has become one for the liquidation of the assets and prop-

erty of the debtor corporation, Trinity Refining Company, and for the distribution of the proceeds from such liquidation to those creditors entitled to such distribution under the terms of the Bankruptcy Act, giving due regard to creditors holding liens and to the order of priority of payment provided by Section 64 of the Bankruptcy Act. The State of Texas has not in its asserted claim brought itself within any class of creditor or party entitled, under the terms of the Bankruptcy Act, to any distributive interest in the estate of debtor corporation. On the contrary the ulterior motive of petitioners is the attempt to obtain a monetary recovery by way of penalty and such a claim is not cognizable in bankruptcy. If petitioners should be allowed to obtain possession of the oil in controversy and should petitioners in the State Court obtain judgment of forfeiture, such judgment would result in the immediate sale of the illegal oil by the State to the highest bidder. The State would pocket the money and in consideration of the purchase price paid for the oil, the buyer, whoever he might be, would be granted tenders authorizing him to freely move the oil in question in intra-state commerce. Since this proceeding is now a creditors proceeding, such result would mean that the public at large would not be benefited by such recovery since the oil, although illegally produced, would eventually find its way into commerce; the debtor would not be penalized since it has been found to be insolvent and all of its assets

are to be distributed prorata to its creditors. The final result would be the unjust enrichment of the State of Texas at the expense of civil creditors, who had no part in the alleged unlawful act.

SUMMARY

It is respectfully submitted that the action taken by petitioners in the final analysis is either in the nature of an action in the Bankruptcy Court to try title or a prayer for the satisfaction of a claim. If the motion as made by petitioners in the trial court be considered one to try title to the oil involved, then the Bankruptcy Court had full authority to hear and determine such issue and under the authorities was correct in its implied holding that the Trustee held title to the oil in question.

If on the other hand the motion filed by the State of Texas in the trial court be considered as the request for the satisfaction of a claim, then the order denying the relief sought was properly entered as the judgment of the trial court for the reason that the character of claim asserted by the State of Texas is not one provable in bankruptcy by virtue of the provisions of Section 57 (j) of the Bankruptcy Act and for the further reason that granting such relief would mean the enforcement by the Federal Court, sitting in bankruptcy, of a penal law of the State of Texas.

WHEREFORE, premises considered, this respondent respectfully prays to this Court that the opinion of the Circuit Court of Appeals, which is reported in 88 Fed. (2d) 48, be in all things affirmed.

DAVID DONOGHUE, *Respondent*,

By R. W. Kellough
Attorney.

R. W. KELLOUGH, Tulsa, Oklahoma,
Attorney for Respondent.
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Fort Worth, Texas,
Of Counsel."

Proof of Service of Copy

I, R. W. Kellough, do by these presents certify that I did on the 16th day of October, 1937, serve a copy of the foregoing upon William McCraw, Attorney General of the State of Texas, and W. B. Harrell, Counsel for Respondent.

R. W. Kellough

R. W. KELLOUGH.

Subscribed and sworn to before me this the 16th day of October, 1937.

Margaret M. Fenelon

Notary Public in and for Tarrant County, Texas.

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No. 28

In the Supreme Court of the United States

October Term, 1937.

STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDE, RECEIVERS, ETC., *Petitioners,*

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Reply of Respondent to Supplemental and Reply Brief for the State of Texas.

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STATE OF TEXAS AND J. C. CLOPTON AND BULLOCK HYDE, RECEIVERS, ETC., *Petitioners,*

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR, *Respondent.*

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

REPLY OF RESPONDENT TO SUPPLEMENTAL AND REPLY BRIEF FOR THE STATE OF TEXAS.

The order allowing *certiorari* clearly states the issues in this case:

> "The petition for writ of *certiorari* is granted limited to the question raised upon the application of the State for permission to take proceedings for the confiscation of the alleged illegal oil."

This raises for first consideration the right and power of the State to confiscate the property involved.

Propositions.

Respondent urges the following propositions:

I.

The Act of the Legislature of the State of Texas, article 6066(a), section 10, Revised Statutes of Texas, contravenes, violates and is repugnant to article 1, section 10 of the Federal Constitution, and to the 5th and 14th Articles of Amendments thereto.

II.

The act is unreasonable because it confers arbitrary, capricious and oppressive powers on state authorities.

III.

The act interferes with and creates burdens on interstate commerce.

ARGUMENT *and* AUTHORITIES.

PROPOSITION I.

The act of the legislature of the State of Texas, article 6066(a), section 10, Revised Statutes of Texas, contravenes, violates and is repugnant to article 1, section 10, of the Federal Constitution, and to the 5th and 14th articles of amendments thereto.

The act involved here, is clearly an act of confiscation. That is the State's own construction (R. 32; State's brief, 3, 4, 5, 6, 12, 15, 16, 19, 20, 23, 26; State's supplemental and reply brief, 1, 2, 3, 5, 9).

Judicial history discloses that confiscation is a war measure, or in the nature of war measure:

> "It is a general rule that the property of the subjects of an enemy found in the country may be appropriated by the government without notice, unless there be a treaty to the contrary." *(Ware* v. *Hylton, et al.*, 3 Dallas 199.)

Chief Justice MARSHALL in an early case, *Brown* v. *United States,* (1814) 8 Cranch 122, said:

> "Respecting the power of government no doubt is entertained. That war gives to the sovereign full right to take the persons and confiscate the property of the enemy whenever found is conceded. The mitigations of this rigid rule, which the humane and wise policy of modern times has introduced into practice, will more or less affect the exercise of this right, but cannot impair the right itself.

"That remains undiminished, and when the sovereign authority shall choose to bring it into operation, the judicial department must give effect to its will. But until that will shall be expressed, no power of condemnation can exist in the court.

"The modern rule, then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated.

"The proposition that a declaration of war does not, in itself, enact a confiscation of the property of the enemy within the territory of the belligerent, is believed to be entirely free from doubt.

"The 'act concerning Letters of Marque, prizes, and prize goods,' certainly contains nothing to authorize this seizure.

"There being no other act of Congress which bears upon the subject, it is considered as proved that the legislature has not confiscated enemy property which was within the United States at the declaration of war; and that this sentence of condemnation cannot be sustained.

"It appears to the court, that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate property which was within their territory at the declaration of war."

And the following from Blatchford Prize Cases 620:

"A suit in confiscation is an action of entirely different nature from a proceeding in prize. Confiscation is the act of the sovereign against a rebellious subject. Condemnation as prize is the act of a belligerent against another belligerent. Confiscation may be effected by such means, either summary or arbitrary, as the sove-

reign expressing its will through lawful channels, may please to adopt. Condemnation as prize can only be made in accordance with principles of law recognized in the common jurisprudence of the world. Both are proceedings *in rem*, but confiscation recognizes the title of the original owner to the property which is to be forfeited, while in prize the tenure of the property seized is qualified, provisional and destitute of absolute ownership."

During the Civil War, acts, generally known as the Confiscation Acts, were passed by Congress, August 6, 1861 (Stat. at L. XII, 319, and July 17, 1862, Stat. at L. XII, 589 and 627), under which,

"All of the offender's property was to be forfeited and sold, the proceeds to be paid into the United States Treasury and applied to the support of the armies. An 'Explanatory Joint Resolution,' intended to save the measure from the veto of President LINCOLN, who regarded the original bill as violating the attainder clause of the Constitution (Art. 1, Sec. IX, ¶3), limited the duration of the forfeiture of real estate to the life of the offender. * * * The proceedings, enforced through the federal district courts under the direction of the attorney general and the district attorneys, were conducted as actions *in rem* with a general conformity to admiralty procedure, allowing, however, the common law right of jury trial (*Morris* v. *Cotton*, 8 Wallace 507). The acts were not extensively enforced, the largest seizures being effected in the border states, and in Louisiana and New York. Though a considerable litigation was occasioned, the net proceeds secured (approximately $130,000 for the second confiscation act) were almost incredibly small. Financially, then, confiscation was a failure, while the other object of the acts, that of punishment, was very unequally accomplished. The Su-

preme Court (11 Wallace 268) upheld the constitutionality of these acts, placing them in the category of war measures, supported by 'an undoubted belligerent right,' and declaring that they involved no unconstitutional denial of 'due process of law'."

—Cyclopedia of American Government, Vol. I, p. 380.

One of the most important opinions of this court on confiscation is *Page* v. *U. S.*, 11 Wal. 268 (Dec. 1870 term). The decision was by a divided court, Mr. Justice FIELD, Mr. Justice CLIFFORD and Mr. Justice DAVIS dissenting. It appears from the opinions that President LINCOLN, even though the confiscation acts were war measures, indicated he would not sign the act, because as stated in Mr. Justice FIELD's dissenting opinion, he, President LINCOLN, was of the opinion that the act was unconstitutional and that he intended to veto it. His objections were that the restrictions of the Constitution concerning forfeitures not extending beyond the life of the offender had been disregarded. To meet his objection a Joint Resolution explanatory of the act was passed by the House and Senate, and President LINCOLN returned the bill with a message in which he stated that he considered the act and Resolution explanatory of the act as being substantially one, and had approved and signed both.

From Mr. Justice FIELD's dissent we quote:

"It seems to me that the reasoning (in majority opinion) which upholds the proceedings in this case, works a complete revolution in our criminal jurisprudence, and establishes the doctrine that proceedings for the punishment of crime against the person of the offender may be disregarded, and proceedings for such punishment be taken against his propeerty alone; or

that proceedings may be taken at the same time both against the person and the property, and thus a double punishment for the same offense be inflicted."

In reference to Bills of Attainder, this court has held, *Cummings* v. *Missouri*, (1866) 4 Wall. 277, opinion by Mr. Justice FIELD as follows:

"No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligations of contract.

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense.

"In all these cases there would be the legislative enactments creating the deprivation, without any of the ordinary forms and guards provided for the security of the citizen in the administration of justice by the established tribunals.

"The legal result must be the same, for what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative en-

actment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental laws was a vain and futile proceeding."

See, also, *Ex parte Garland*, 4 Wall. 333;

"All enactments of this kind partake of the nature of bills of pains and penalties, and are subject to the constitutional inhibition against the passage of bills of attainder, under which general designation they are included."

See, also, *Drehman* v. *Stifle*, 8 Wall. 595.

Enemy property cannot be condemned by the court without an Act of Congress authorizing its seizure and confiscation. *Conrad* v. *Waples*, 96 U. S. 279 (October term 1877, opinion by Mr. Justice FIELD).

This court in *Henkels* v. *Sutherland*, 271 U. S. 298, in an opinion in a case arising under Trading With the Enemy Act (Alien Property Custodian), opinion by Mr. Justice SUTHERLAND, in a claim for the recovery of the proceeds of the sale of certain corporate stock which had been seized, held:

"With enemy-owned property seized by the custodian, it has been held, the United States may deal as it sees fit, *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, *ante*, 275, 46 Sup. Ct. Rep. 116 (decided Dec. 14, 1925); but it has no such latitude in respect of the property of an American citizen. Whether the government shall pay interest upon its obligations depends upon congressional assent; but it cannot confiscate the actual increment of property belonging to a citizen, or the increment of the proceeds into which such property has been converted, any more than it can confiscate the

property or its proceeds, without coming into conflict with the Constitution.'

See, also, *French* v. *Wade*, 102 U. S. 132, where even under the confiscation acts of the Civil War the heirs of the owners of lands seized thereunder were protected in their inheritances by the Joint Resolution of the House and Senate passed at President LINCOLN's special request.

To the same effect, see *Pike* v. *Wassel*, 94 U. S. 711.

Sale of confiscated property under the Act of July 17, 1862, did not affect a mortgage on the property in favor of a third person; and a subsequent sale under the mortgage may be valid. *Shields* v. *Schiff*, 124 U. S. 351.

Even under the confiscation acts of the Civil War the estate acquired by a purchaser of the confiscated real property terminates with the life of the person for whose act it was seized. *Waples* v. *Hayes*, 108 U. S. 6; *Wallach* v. *Van Riswick*, 92 U. S. 202.

From *Fletcher* v. *Peck*, 6 Cranch 87, we quote a part of Chief Justice MARSHALL's opinion:

"Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each state.

"No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

"A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

"In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. * * *

"The state legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury.

"Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds the estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law.

"It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased.

"This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?"

We respectfully contend that the powers of confiscation of private property of a citizen can only be authorized and exercised by Act of Congress as a war measure.

The police power which the states may exercise, without infringing the rights of citizens under the Constitution, must have to do with public health, public morals and public safety, public convenience and public welfare.

We respectfully quote from the dissenting opinion of Mr. Justice McReynolds, with whom concurred Mr. Justice Day and Mr. Justice Van Devanter, in the case of *Ruppert* v. *Caffey*, 251 U. S. 264:

"For sixty years, *Ex parte Milligan*, 4 Wall. 2, 120, 125, has been regarded as a splendid exemplification of the protection which this court must extend in time of war to rights guaranteed by the Constitution, and also as decisive of its power to ascertain whether actual military necessity justifies interference with such rights. The doctrines then clearly—I may add, courageously—announced conflict with the novel and hurtful theory now promulgated. A few pertinent quotations from the opinion will accentuate the gravity of the present ruling:

'Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words that it would seem the ingenuity of man could not evade them, are *now*, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever

invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just authority.

'This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by WASHINGTON and LINCOLN; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to free men. For this, and other equally weighty reasons, they secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus.*'

* * * * * * * *

"Moreover, well-settled rights of the individual in harmless property and powers carefully reserved to the states ought not to be abridged or destroyed by mere argumentation based upon supposed analogies. The Constitution should be interpreted in view of the spirit which pervades it, and always with a steadfast purpose to give complete effect to every part according to the true intendment—none should suffer emasculation by any strained or unnatural construction. And these solemn words we may neither forget nor ignore: 'Nor shall any person * * * be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.' (5th Amend.) 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.' (10th Amend.)"

There is no likeness, similarity, identity or analogy between the confiscation of oil and the forfeiture by states of property in connection with violation of state liquor statutes, as petitioners herein argue, because oil is a harmless property in so far as public health, public morals, and public safety is concerned, but contributes much to the public welfare and public convenience, and is, as stated in the majority opinion of the Circuit Court of Appeals "valuable property" and "not a nuisance *per se.*" We contend that oil is of this classification, a valuable, useful and necessary property, while alcoholic liquor has been branded and condemned by early decisions of this court, and by continuous decisions, as an object which, unless controlled, is dangerous to public health, public safety and public morals.

So we respectfully contend that none of the liquor cases cited by the state are applicable to the confiscation question presented in this case.

Proposition II.

The act is unreasonable because it confers arbitrary, capricious and oppressive powers on state authorities.

We readily agree that conservation of oil and gas resources is a proper subject for state legislation and control. The law is well settled by the decisions of this court, and of the inferior federal courts, and state courts, that states have a power to pass *reasonable* laws pertaining to the conservation of oil and gas. Such laws must be *reasonable,* and may not be arbitrary, capricious or oppressive. Mr. Chief Justice Hughes in delivering the opinion in *Sterling* v. *Constantine,* 287 U. S. 398, says:

> "The existence and nature of the complainants' rights are not open to question. Their *ownership* of the oil is undisputed. Their *right* to the enjoyment and use of these properties subject to *reasonable regulation* by the state in the exercise of its power to prevent unnecessary loss, destruction and waste, is protected by the due process clause of the Fourteenth Amendment. *Ohio Oil Co.* v. *Indiana,* 177 U. S. 190, 44 L. ed. 729, 20 S. Ct. 576, 20 Mor. Minn. Rep. 466; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 55 L. ed. 369, 31 S. Ct. 337, Ann. Cas. 1912C, 160; * * *.
>
> "When there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression."

It seems apparent that the Texas act complained about in this case which gives the State of Texas the right and power to confiscate property of citizens and impose a fine of $1,000.00 a day is *arbitrary, capricious, oppressive* and *unreasonable.*

See *Lindsley* v. *Natural Carbonic Gas Co.,* opinion by Mr. Justice VAN DEVANTER, 220 U. S. 61.

See, also, *Ohio Gas Co.* v. *Conway,* 281 U. S. 146, opinion by Mr. Chief Justice HUGHES from which we quote:

> "The states have a wide discretion in the imposition of taxes. When dealing with their proper domestic concerns, and not trenching upon the prerogatives of the national government or violating the guaranties of the Federal Constitution, the states have the attribute of sovereign powers in devising their fiscal systems to insure revenue and foster their local interests. The states, in the exercise of their taxing power, as with respect to the exertion of other powers, are subject to the requirements of the due process and the equal protection clauses of the 14th Amendment, but that amendment imposes no iron rule of equality, prohibiting the flexibility and variety that are appropriate to schemes of taxation.
>
> * * * * * * *
>
> "With all this freedom of action, there is a point beyond which the state cannot go without violating the equal protection clause. The state may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The state is not at liberty to resort to a classification that is palpably arbitrary."

See, also, *Champlin Refining Co.* v. *Corporation Commission,* 286 U. S. 210, opinion by Mr. Justice BUTLER:

> "Every person has the right to drill wells on his

own land and take from the pools below all the gas and oil that he may be able to reduce to possession including that coming from land belonging to others, but the right to take and thus acquire ownership is subject to the *reasonable exertion* of the power of the state to prevent unnecessary loss, destruction or waste."

Acts by the state, and regulation by any commission, must be reasonable, and not unreasonable, arbitrary, capricious or oppressive.

The great expounder of the Constitution, Daniel Webster, with prophetic insight, suggested to this very court the situation we are faced with in this case; we respectfully quote from his argument in the case of *Dartmouth College Trustees* v. *Woodward*, 4 Wheat. 518, which is pertinent and applicable here now (Webster, Vol. X, p. 218):

"If the constitution be not altogether waste-paper, it has restrained the power of the legislature in these particulars. If it has any meaning, it is that the legislature shall pass no act directly and manifestly impairing private property and private privileges. It shall not judge by act. It shall not decide by act. It shall not deprive by act. But it shall leave all these things to be tried and adjudged by the law of the land.

* * * * * * *

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities under the protection of the general rules which govern society. Everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so, acts of attainder, bills of

pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees, and forfeitures in all possible forms, would be the law of the land.

"Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general, permanent law for courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law or to administer the justice of the country. 'Is that the law of the land,' said Mr. Burke, 'upon which, if a man go to Westminister Hall, and ask counsel by what title or tenure he holds his privilege or estate *according to the law of the land,* he should be told, that the law of the land is not yet known; that no decision or decree has been made in his case; that when a decree shall be passed, he will then know *what the law of the land is?* Will this be said to be the law of the land by any lawyer who has a rag of a gown left upon his back, or a wig with one tie upon his head?'

"The plaintiffs contend, in the second place, that the acts in question are repugnant to the tenth section of the first article of the Constitution of the United States. The material words of that section are: 'No state shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.'

"The object of these most important provisions in the national Constitution has often been discussed, both here and elsewhere. It is exhibited with great clearness and force by one of the distinguished persons who framed that instrument, 'Bills of attainder, *ex post*

facto laws, and laws impairing the obligation of contracts, are contrary to the first principles of the social compact, and to every principle of sound legislation. The two former are expressly prohibited by the declarations prefixed to some of the state constitutions, and all of them are prohibited by the spirit and scope of these fundamental charters. Our own experience has taught us, nevertheless, that additional fences against these dangers ought not to be omitted. Very properly, therefore, have the convention added this constitutional bulwark, in favor of personal security and private rights; and I am much deceived, if they have not, in so doing, as faithfully consulted the genuine sentiments as the undoubted interests of their constituents. The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret, and with indignation, that sudden changes, and legislative interferences in cases affecting personal rights, become jobs in the hands of enterprising and influential speculators, and snares to the more industrious and less informed part of the community. They have seen, too, that one legislative interference is but the link of a long chain of repetitions; every subsequent interference being naturally produced by the effects of the preceding'." (The Federalist, No. 44, by Mr. Madison, Vol. X—15.)

Proposition III.

The act interferes with and creates burdens on interstate commerce.

Oil is property, a legitimate and valuable article of commerce, and in general use throughout the nation; it is an important object of both domestic and foreign commerce.

The regulation of commerce was expressly granted by the Constitution to Congress. (Article I, Sec. 8, Par. 3.)

States have no power to restrict commerce, to interfere with it, or with the articles and objects of commerce.

—*West* v. *Kansas Natural Gas Co.*, 221 U. S. 299; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50.

Kentucky Whip & Collar Company v. *Illinois Central Railroad Company*, 299 U. S. 334 (number 138, September, 1936, term) opinion ~~from~~ Mr. Chief Justice HUGHES, from which we quote:

> "The Commerce clause (Art. I, §8, ¶3) confers upon the Congress the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." (*Gibbons* v. *Ogden*, 9 Wheat. 1.)

And we respectfully quote, as supporting respondent in this case, from the argument of Mr. Daniel Webster in *Gibbons* v. *Ogden*, in this court at the February, term, 1824 (Webster, Vol. XI, p. 11):

> "I contend, therefore, that the people intended, in establishing the Constitution, to transfer from the several states to a general government those high and important powers over commerce, which, in their exercise, were to maintain a uniform and general system. From the very nature of the case, these powers must be exclusive; that is, the higher branches of commercial regulation must be exclusively committed to a single hand. What is it that is to be regulated? Not the commerce of the several states, respectively, but the commerce of the United States. Henceforth, the commerce of the states was to be a *unit;* and the system by which it was to exist and be governed must necessarily be complete, entire, and uniform. Its character was to be described in

the flag which waved over it, *E Pluribus Unum*. Now, how could individual states assert a right of concurrent legislation, in a case of this sort, without manifest encroachment and confusion? It should be repeated, that the words used in the Constitution, 'to regulate commerce,' are so very general and extensive, that they may be construed to cover a vast field of legislation, part of which has always been occupied by state laws; and therefore the words must have a reasonable construction, and the power should be considered as exclusively vested in Congress so far, and so far only, as the nature of the power requires."

As to rights and power of seizure of offending property see the following:

Mugler v. *Kansas*, 123 U. S. 623; opinion by Mr. Justice HARLAN: There he lays down the rule in reference to alcoholic liquor being prejudicial to the health, the morals and the safety of the people and for that reason is a legitimate subject for the exercise of police powers by the state.

See, also, *Samuels* v. *McCurdy*, 267 U. S. 188, opinion by Mr. Chief Justice TAFT, and dissenting opinion by Mr. Justice BUTLER, from which dissenting opinion we respectfully quote:

"The insistence is that the state is without power to seize and destroy a private supply of intoxicating liquor lawfully acquired before the prohibitory legislation, and kept in one's house for his own use. Such seizure and destruction can be supported only on the ground that the private possession and use would injure the public. See *Mugler* v. *Kansas*, 123 U. S. 623; *Gardner* v. *Michigan*, 199 U. S. 325.

* * * * * * * *

"Any suggestion that the destruction of such private supply lawfully acquired and held for the use of the owner in his own home is necessary for, or has any relation to, the suppression of sales, or to the regulation of the liquor traffic, or to the protection of the public from injury, would be fanciful and without foundation.

* * * * * * * * *

"To me it seems very plain that, as applied, the law is oppressive and arbitrary, and that the seizure deprived plaintiff in error of his property in violation of the due process clause of the 14th Amendment. I would reverse the judgment of the state court."

We respectfully assert that if the Texas statute for confiscation of oil as a punishment for violation of the proration law does not infringe upon the rights of the citizens of the United States under the provisions of the Federal Constitution, then there is no boundary which the State is forbidden to cross in proceeding against the property, liberty and life of the citizen. Confiscation may be extended to all kinds of property. Each State may assume to exercise such power and pass laws to confiscate the product of the farm, the field, the forest and the factory within the state boundaries. We contend that the Federal Constitution is the citizen's shield against such acts; and the alleged violator of the law, and the creditors in this case who in good faith dealt with the oil producer without knowledge or notice of any irregularity or law violation, are in a position to assert constitutional rights. Under the decisions of this court every citizen, and even an alien *(Truax* v. *Raich,* 239 U. S. 33, opinion by Mr. Justice HUGHES) may raise the Federal Constitution as a shield against the wrongful aggression of the State.

The decision of the United States District Court and the decision of the Circuit Court of Appeals of the Fifth Circuit are right.

We respectfully submit that the Circuit Court's decision should be affirmed.

Dated November 3, 1937.

ROBERT W. KELLOUGH,
Tulsa, Oklahoma,
Counsel for Respondent.

H. T. McGOWN,
H. L. LOGAN, JR.,
Fort Worth, Texas,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

NO. 28

STATE OF TEXAS and J. C. CLOPTON and BULLOCK HYDE, RECEIVERS, ETC.,
Petitioners,

vs.

DAVID DONOGHUE, TRUSTEE OF TRINITY REFINING COMPANY, DEBTOR,
Respondent.

MOTION FOR REHEARING BY DAVID DONOGHUE, TRUSTEE UNDER AN ORDER TO LIQUIDATE, RESPONDENT

[redacted]

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MOTION FOR REHEARING BY DAVID DONOGHUE, TRUSTEE UNDER AN ORDER TO LIQUIDATE, RESPONDENT

To the Honorable the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Now comes David Donoghue, Trustee under an order to liquidate the estate of the above named debtor, and files this his petition for rehearing and as grounds therefor respectfully shows the following:

I

The controversy between the State of Texas and this Trustee, as representative of the creditors, is not as to the right of the State to maintain an action for forfeiture but concerns the substantive results of a judgment enforcing forfeiture as to the oil which is admittedly in the lawful possession of the Trustee.

The bankruptcy court recognized this fact and denied the State permission to proceed in the state court not because of the *nature* of the contemplated action by the State but because *the State could obtain all relief in the bankruptcy court which it could ultimately obtain if it should obtain a judgment enforcing a forfeiture of the oil in a state court.*

We respectfully submit that the bankruptcy court was correct and that the action in denying the State leave to institute a suit enforcing a forfeiture in a state court *did not deny the State its day in court.*

The very gist and basis of an action by the State to enforce a forfeiture involves two issues: (a) was the oil in controversy produced as allowable oil? (b) if not, when does or did title pass to the State? On such issues, if the State of Texas should be permitted to institute an action in a state court, the state court might enter any one of four judgments, namely: (1) the oil is allowable oil and no recovery by the State; (2) the oil was illegally produced and title vests in the State at the date of judgment; (3)

the oil was illegally produced and title vests in the State at the date of judgment, but relates back to the date of production; (4) the oil was illegally produced and title vested in the State at date of production.

If the state court should enter judgment (1) admittedly the State of Texas would have no right to the oil.

If the state court should enter judgments (2) or (3) the State of Texas would then file its motion in the bankruptcy court for a surrender of the oil. That motion would be contested by this Trustee upon the basis of 57(j) of the Bankruptcy Act, which is applicable to proceedings under 77B (subsection k) and bars judgments for forfeiture as well as claims for forfeiture. *In re: Abramson and Fichhandler* (C. C. 2nd Cir.), 210 Fed. 878; *United States v. Birmingham Trust Company* (C. C. 5th Cir.), 258 Fed. 562; *in re: Southern Steel Co.* (S. Ct. Ala.), 183 Fed. 498. Thus there would ultimately be presented to the bankruptcy court for determination the question as to whether or not Section 57(j), of the Bankruptcy Act, bars a recovery by the State.

If the state court should enter judgment (4), then, as is stated in the majority opinion, the bankruptcy court, on motion by the State, would doubtless recognize that title and direct the Trustee to hand over the oil, or to account for it, to the State.

Thus, irrespective of the character of the judgment which might be entered by the state court, the ultimate recovery by the State depends *solely upon the question of title.*

It is a general rule of substantive law not limited to bankruptcy matters that

> "Where a court of competent jurisdiction takes possession of property through its officers this withdraws it from the jurisdiction of all other courts, which though of concurrent jurisdiction may not disturb that possession; and *that the court originally acquiring possession is competent to hear and determine all questions respecting title, possession and control of the property.*"

Isaacs v. Hobbs Tie & Timber Co., 282 U. S. 734, 737, 75 L. Ed. 645, 664; *In re: Baldwin*, 291 U. S. 610, 616, 78 L. Ed. 1020, 1023; *Murphy v. Hoffman*, 211 U. S. 562, 568, 53 L. Ed. 327; *Board of Trade v. Johnson*, 264 U. S. 1, 11, 68 L. Ed. 533; *Herbert v. Crawford*, 228 U. S. 203, 205, 57 L. Ed. 800.

That this Trustee lawfully took possession of the oil in controversy and now holds rightful possession was determined by final judgment of the Circuit Court in this case and affirmed by the opinion of this Court. It follows that under the general rule the bankruptcy court had and has jurisdiction to determine all questions concerning *title, possession and control* of such oil.

If the order of the bankruptcy court denying the State permission to proceed in a state court to enforce a forfeiture is sustained and the State urges its alleged right to the oil in the 77B proceedings issues (a) and (b) above will, just as they would in an action in the state court, constitute the gist of the State's right of action.

If the bankruptcy court should enter judgment (1) above admittedly the State would have no right to the oil.

If the bankruptcy court should rule in accordance with judgments (2) and (3) above as to the vesting of title, at the same time it would determine whether or not 57(j) of the Bankruptcy Act bars a recovery of the oil by the State.

If the bankruptcy court should rule in accordance with judgment (4) above, then, as is stated in the majority opinion, it would doubtless recognize that title in the State and direct the Trustee to hand over the oil or account for it to the State.

Accordingly, whether the State urges its position in a state court or in the bankruptcy court, the ultimate result will be the same. This being true it is submitted that the order of the bankruptcy court denying the State permission to proceed in a state court was not an abuse of discretion.

The principles governing the exercise of judicial discretion have been defined by this Court as "the

court * * * is to be guided by considerations that under the law make for the ascertainment of what is just for the claimants, the debtor and the estate," *Faust v. Munson*, S. S. Lines, No. 19 decided November 9, 1936, 299 U. S. 71, 81 L. Ed. 30, "* * * is directed by the reason and conscience of the judge to a just result * * *," *Langes v. Green*, 282 U. S. 531, 541, 75 L. Ed. 520, 526, "* * * implies conscientious judgment * * *," *The Styria v. Morgan*, 186 U. S. 1, 9, 46 L. Ed. 1027, 1033.

Any analysis of the inevitable results of reversing or affirming the order of the trial judge denying the State of Texas permission to proceed in a state court entails the following considerations: if reversed, (a) the exclusive jurisdiction of the bankruptcy court provided in 77B (a) as the means of eliminating the evils of equity receiverships is undermined; (b), a final determination of the instant case must await the pleasure of the State in obtaining judgment in a state court; (c), if, assuming an appeal, after the case has passed the state district court, the court of civil appeals and the supreme court of Texas, the judgment as finally determined is of type (2) or (3) above, under standard practice three years will have passed and the ultimate controversy between the parties will still depend upon a final adjudication concerning 57(j) by the federal courts; and (d), the multiplicity of suits and the attendant delay and expense will constitute an unfair and unjust burden on the civil creditors.

In contrast, if the decision of the trial judge is affirmed (a) the State of Texas will obtain the same relief which it could have ultimately obtained if it had obtained judgment in the state court, (b) the entire controversy will be determined in one action with a minimum expenditure of time and expense to all parties.

In view of the foregoing, we respectfully submit that the order of the trial judge in all things fully met the test of what constitutes a valid exercise of judicial discretion.

II

It is the Trustee's sincere opinion that Section 77B of the Bankruptcy Act is one of the most splendid instruments devised in the history of jurisprudence for the administration of financially embarrassed organizations. The evils of ancillary receiverships, the bargaining strength of selfish minorities and lack of control over the plan of reorganization, counsel fees and future attacks, all have been eliminated by Section 77B. The strength and effectiveness of 77B in a large measure arises from the increased jurisdiction granted the bankruptcy courts by subsection (a) and other provisions of the section. Accordingly, while not controlling here, we respectfully submit that the statement in the majority opinion "The State's right to bring the suit in the state court is the same as if on its vol-

untary petition the company had been adjudged bankrupt on the day its petition for reorganization was approved. Section 77B (o)," is error and in the future may be made the basis of attempts to encroach upon the powers of bankruptcy courts which are essential to an effectuation of the purposes of 77B. Subsection (o) of 77B is not a limitation upon jurisdiction, but is an additional grant of powers and jurisdiction to the bankruptcy courts. The first two phrases in subsection (o) read, "In proceedings under this section *and consistent with the provisions thereof* * * *." In subsection (a) the bankruptcy courts are granted "exclusive jurisdiction of the debtor and his property wherever located." By subsection (c) (10) the bankruptcy court is authorized to "enjoin or stay the commencement or continuation of suits against the debtor * * *." By reason of these and other provisions of Section 77B, the powers and jurisdiction of a bankruptcy court in a proceeding under 77B have been held to be far greater than the powers and jurisdiction of the same court in an ordinary bankruptcy. *Continental Illinois Nat. Bank & Trust Co. v. Chicago, Rock Island & Pac. Ry. Co.*, 294 U. S. 648; *In re: Prudence Bonds Corp.* (C. C. 2nd Cir.), 75 F. (2d) 262, (summary jurisdiction without right of possession); *In re: Cloisters Bldg. Corp.* (C. C. 7th Cir.), 79 F. (2d) 694, (power to grant stays); *In re: Greyling Realty Corp.* (C. C. 2nd Cir.), 74 F. (2d) 734, (extraterritorial authority);

In re: O'Brien, 78 F. (2d) 715, (exclusive jurisdiction over debtor).

By reason of the authority granted the bankruptcy courts by subsections (a) and (c) (10) of 77B, and the powers emanating from the actual possession of the Trustee, which powers and authority are not limited by 77B (o), the trial court had jurisdiction to hear and determine all controversies concerning the oil. The State has no "right" under 77B (o) to maintain its action in a state court, for exclusive jurisdiction is in the bankruptcy court. If justice required, on motion by the State, the bankruptcy court might waive its exclusive jurisdiction to the extent of permitting an action in the state court. Then the authority of the State would be derived not from 77B (o) or other grant of right in 77B but upon the permission granted by the bankruptcy court.

III

In conclusion, if we look to the substance and not to the form of the State's position in this case, we find that the mantle of righteous crusading it has vigorously waved in the circuit court and this court hides a purpose wh ch a court of equity would not further. The debtor is insolvent and an order of liquidation has been entered. The State admits that it seeks the oil merely as a penalty against the debtor, yet in what possible way would the debtor be penal-

ized through a recovery by the State? If the State recovers, the oil will be sold as under ordinary execution and the State will deposit the funds "to the credit of the General Revenue Fund of the State of Texas." The result is that while the debtor will not be penalized the State will be unjustly enriched at the expense of civil creditors.

Congress by the enactment of 57(j) intended that the creditors at large shall "not be mulcted" by penalties and forfeitures accruing to a State.

In this case the equities, the intent of Congress as to the exclusive jurisdiction of a bankruptcy court and the considered opinion of the trial judge all support the denial of permission to the State to proceed in a state court. Only injustice, established beyond question, should afford a sufficient predicate for overruling such considerations. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 526; *New York v. Irving Trust Co.*, 288 U. S. 329, 333:

> "The Federal government possesses supreme power in respect to bankruptcies. International Shoe Co. v. Pinkers, 278 U. S. 261, 265. If a state desires to participate in the assets of a bankrupt, she must submit to appropriate requirements by the controlling power; otherwise, orderly and expeditious proceedings would be impossible and a fundamental purpose of the Bankruptcy Act would be frustrated."

We respectfully submit that in justice to all parties at interest the decision of the trial court should

be affirmed. It is, accordingly, prayed that this petition for rehearing be granted and that upon further hearing herein the decision of the circuit court be in all things affirmed.

DAVID DONOGHUE, Trustee, Under
Order to Liquidate,

By R W Kellough
Attorney.

R. W. KELLOUGH,
Tulsa, Oklahoma;
H. T. MCGOWN,
H. L. LOGAN, JR.,
Fort Worth, Texas,
Of Counsel.

David Donoghue, trustee in reorganization, through his attorney, W. B. Harrell, joins in the above petition.

DAVID DONOGHUE,
Trustee in Reorganization,
By W. B. Harrell, Attorney.

I, R. W. KELLOUGH, duly appointed attorney for David Donoghue, Trustee, under order to liquidate, hereby certify that this petition is presented in good faith and not for delay and that copies of this petition have been mailed to counsel for petitioners and to counsel for the original respondent in this case.

R W Kellough

SWORN TO AND SUBSCRIBED before me this 22 day of December, A. D. 1937.

Bernice Simmons

Notary Public in and for Tarrant County, Texas.

SUPREME COURT OF THE UNITED STATES.

No. 28.—October Term, 1937.

State of Texas and J. C. Clopton and Bullock Hyder, Receivers, etc., Petitioners,
vs.
David Donoghue, Trustee.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 6, 1937.]

Mr. Justice Butler delivered the opinion of the Court.

This writ is limited to the questions raised on the application of Texas to the United States court for the northern district of that State in a proceeding under § 77B of the Bankruptcy Act [1] for permission to institute proceedings in a state court for the confiscation of oil held by the trustee but claimed by the State as "unlawful oil" because produced or transported in violation of state conservation measures.

Texas statutes [2] and orders of its Railroad Commission purport to prorate production of crude oil, to prohibit purchase, transportation or handling of that produced in whole or in part in excess of the amount allowed,[3] to impose fines and penalties for violations,[4] and to make oil produced or transported in violation of statute or order subject to confiscation in an action brought by the State for that purpose.[5] The statute declares that if at the trial it shall be

[1] 11 U. S. C., § 207.

[2] Texas Revised Civil Statutes, 1925, Title 102.

[3] Art. 6049e, § 10.

[4] Art. 6036.

[5] Art. 6066 (a), § 10:

(a) "All unlawful oil . . . [is] hereby declared to be a nuisance and shall be forfeited to the State as hereinafter provided. . . .

(b) "When the Attorney General is advised from any source of the presence and existence of unlawful oil . . . it shall be his duty to institute a suit in rem against such unlawful oil . . . and against all persons owning, claiming or in possession thereof, such suit to be brought in the name of the State . . . in any court of competent jurisdiction in Travis County or in the county in which such oil . . . is located. If it shall appear to the court . . . that unlawful oil . . . mentioned in the petition . . . [is] in danger of being removed, wasted, lost or destroyed, the court is authorized and required . . . to issue restraining orders or injunctive relief . . .

found that the oil is unlawful, the court shall render judgment forfeiting the same to the State and authorizing an order directed to sheriff or constable commanding him "to seize and sell" the condemned oil. Costs of suit and expenses of the sale are to be paid out of money received from the oil, and the balance becomes part of the general revenue fund of the State.

There is before us no question as to validity of the State's measures to regulate production, or as to when, if ever, the oil in controversy became forfeit.[6] The sole issue is whether the bankruptcy court should have permitted the State to bring suit in a state court to have the oil adjudged confiscate.

These are the facts.

Texas sued the Trinity Refining Company in the district court, 126th judicial district, Travis county, to recover fines and penalties for violation of the conservation laws. The court appointed Clopton and Hyder receivers of defendant's property pending the trial of the case. They took possession of property claimed by the defendant, including a large quantity of oil which the State insists had already become its property because unlawfully produced or transported. Later, the State sued the company in the district court, 98th judicial district of the same county, to recover delinquent taxes. That suit having been transferred to the district in which the first was pending, the court there appointed as receivers in the second case the same persons it had appointed in the first one.

Within four months after commencement of the first suit, the company filed its petition in the United States district court, submitting a plan of reorganization. The court found the petition to have been presented in good faith, approved it as properly filed, appointed Donoghue trustee of the debtor, directed him to take

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or to appoint a receiver to take charge of the oil . . . in question, or to direct the sheriff of the county . . . to seize and impound the same until further orders of the court."

(c) " . . . If, upon the trial of such suit the oil . . . in controversy is found to be unlawful . . . then the court . . . shall render judgment forfeiting the same to the State . . . and authorizing the issuance of an order of sale directed to the sheriff or any constable of the county where the oil or products are located commanding such officer to seize and sell said property in the same manner as personal property is sold under execution . . . The money realized from the sale . . . shall be applied, first, to the payment of the costs of suit and expenses incident to the sale . . . and all funds then remaining, shall be . . . placed to the credit of the General Revenue Fund of the State. . . ."

[6] United States *v.* 1960 Bags of Coffee, 8 Cranch 398. See also Clark *v.* Protection Insurance Co., 1 Story (C. C.) 109, 134.

possession of its property, ordered that all persons having property of the debtor deliver it to him and issued in usual form a restraining order preventing interference with his possession or control. The trustee took from the receivers property claimed by the debtor including the oil in question, approximately 77,000 barrels. Texas applied to the bankruptcy court for permission to bring suit in a state court to obtain judgment of confiscation against that oil. The court withheld consent and directed the trustee to retain the oil. The Circuit Court of Appeals sustained that ruling, 88 F. (2d) 48, 51, and to review its judgment upon that issue, we brought the case here. 301 U. S. —.[7]

The State's right to bring the suit in the state court is the same as if on its voluntary petition the company had been adjudged bankrupt on the day its petition for reorganization was approved. § 77B (o). Forfeiture of unlawful oil under Texas law is a penalty imposed to vindicate the State's policy of conservation. *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, 240-241. The bankruptcy court exercises jurisdiction under sovereignty that is independent of and foreign to that of Texas. *Moore* v. *Mitchell,* 281 U. S. 18, 23. It is without power to enforce penalties imposed by the State for violation of its laws. *The Antelope,* 10 Wheat. 66, 123. *Wisconsin* v. *Pelican Ins. Co.,* 127 U. S. 265, 289, *et seq.* Cf. § 57 (j), Bankruptcy Act;[8] *New York* v. *Jersawit,* 263 U. S. 493, 496; *United States* v. *Childs,* 266 U. S. 304, 309-310. The State's insistence is not that it is presently entitled to establish a right to forfeit the oil, but that the oil became its property when produced or transported contrary to law. It seeks not to forfeit but to enforce the forfeiture that resulted, as it maintains, immediately from unlawful production or transportation.

Possession or control of the oil by the state court is not essential to its jurisdiction to entertain the suit proposed to be brought.[9] Texas does not claim to be entitled to possession of the oil until final adjudication in the state court. Retention by the trustee is not inconsistent with the maintenance of that suit. He is entitled there

[7] Later, no plan of reorganization having been adopted, the bankruptcy court ordered liquidation of the debtor's property under subds. (c) (8) and (k) of § 77 B. Donoghue was appointed trustee in bankruptcy. § 44; 11 U. S. C., § 72. This Court substituted him in that capacity as respondent in place of himself as trustee of the debtor.

[8] 11 U. S. C., § 93 (j).

[9] Art. 6066a, §§ 10 (b) and (c).

to be heard in support of his claim to the oil. If when the debtor's petition was approved the oil did not belong to Texas, the State was not entitled to have it withheld from the trustee. But, if by reason of unlawful production or transportation, the oil had already by forfeiture become the property of the State, the trustee was not entitled to take or retain it. If in a suit brought by Texas in a state court it should be determined that title to the oil had vested in the State before approval of the debtor's petition, the bankruptcy court doubtlessly will recognize that title and direct the trustee to hand over the oil or account for it to the State. *Rose* v. *Himely*, 4 Cranch 241, 268. *Hudson* v. *Guestier*, 4 Cranch 293, 297. See *Wisconsin* v. *Pelican Ins. Co., supra*, 291.

The filing of the petition for reorganization in the bankruptcy court may not be held to deprive the State of opportunity in its own court to establish its claim that through forfeiture it had already become the owner of the oil for that would be to take the State's property for the benefit of the offending company or its creditors. Nor may the receivers' voluntary surrender of possession to the debtor's trustee prevent adjudication of the State's claim. The bankruptcy court abused its discretion in denying the State's application for permission to institute procedings in the state court and, to the extent that the Circuit Court of Appeals sustained that ruling, its judgment must be reversed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 28.—October Term, 1937.

State of Texas, et al., Petitioners,
vs.
David Donoghue, Trustee.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[December 6, 1937.]

Mr. Justice Cardozo, dissenting.

I think the judgment should be affirmed.

Texas was not the owner of the oil in controversy when it came into the possession of the court of bankruptcy. If she had been such an owner, she could be heard in that court *pro interesse suo*, vindicating her title in reclamation proceedings like any other adverse claimant. By common consent ownership sufficient for such relief was not hers when the court of bankruptcy took the oil into its custody, and is not hers today. "It is not correct to say that property forfeited is vested in the government at the very moment of forfeiture, and the title of the owner immediately devested. On the contrary, the established doctrine is, that, notwithstanding the forfeiture, the property remains in the owner, until it is actually seized by the government, and then by the seizure the title of the government relates back to the time of the forfeiture." *Clark* v. *Protection Insurance Co.*, 1 Story 109, 134; cf. *United States* v. *Stowell*, 133 U. S. 1. So far as I am aware there is no contention to the contrary. The oil "shall be forfeited to the State as hereinafter provided" (Texas Revised Civil Statutes, Art. 6066a, § 10), and not otherwise. The statute does not mean that without the aid of any judgment title is transferred at once on the commission of the offense. The judgment is to be *in rem* and imports control over the *res*. *Pennoyer* v. *Neff*, 95 U. S. 714, 734; *Isaacs* v. *Hobbs Tie & T. Co.*, 282 U. S. 734.

With the oil in the possession of the federal court of bankruptcy—a possession lawfully acquired—leave to sue in the state court for a decree of forfeiture and sale will be an idle and empty form, productive of nothing except delay and vain expense, unless upon the pronouncement of the decree it will be the duty of the court of

bankruptcy to surrender the oil to the court of another jurisdiction, and this for the sole purpose of making a forfeiture effective. I deny that any such duty will exist. Cf. *Isaacs* v. *Hobbs Tie & T. Co., supra.* I find no intimation of its existence in any case till this one. Certainly there is none in the cases now cited in the opinion of the court. True indeed it is that if possession of the *res* were to be acquired by the Texas court at the time of the decree of forfeiture or even at the time of a sale pursuant thereto, a title obtained thereunder would be recognized as valid everywhere. *Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 291; *Rose* v. *Himely*, 4 Cranch 241; *Hudson* v. *Guestier*, 4 Cranch 293; Dicey, Conflict of Laws, 5th ed., pp. 484, 485. This is far from saying that a court of another jurisdiction which already holds the *res* upon a trust for general creditors will give its possession up in aid of a forfeiture otherwise impossible. "The courts of no country execute the penal laws of another." *The Antelope*, 10 Wheat. 66, 123; *Gwin* v. *Breedlove*, 2 How. 29, 37; *Wisconsin* v. *Pelican Ins. Co., supra; Huntington* v. *Attrill*, 146 U. S. 657, 666; *Loucks* v. *Standard Oil Co.*, 224 N. Y. 99, 102; Dicey, *supra*, p. 212. Cf. Bankruptcy Act, § 57 (j). Within the purview of that doctrine, the state and the federal courts are ranked as courts of separate sovereignties, quite as much as the courts of different states. *Gwin* v. *Breedlove, supra; Moore* v. *Mitchell*, 281 U. S. 18, 23. If the oil in controversy had been removed to California and were in possession of the receivers of a California corporation after a decree of dissolution, would any one contend that the California court would order its receivers to return the property to Texas for the purpose by such return of making a forfeiture effective? A federal court of bankruptcy is subject to no greater duty. The prevailing opinion commits us to a holding that property in one jurisdiction may be diverted from the use of creditors and made to feed a forfeiture in another jurisdiction, a forfeiture *brutum fulmen* unless thus aided from afar. If that is done, the efficacy of penal laws will have taken on a new extension. Without a transfer of possession the forfeiture is dead at birth. A court of bankruptcy will not stir a hand to make it viable.

I am authorized to state that Mr. Justice STONE joins in this opinion.